

9-1-2009

Sexual Identity as a Fundamental Human Right

Anthony R. Reeves

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/bhrlr>



Part of the [Civil Rights and Discrimination Commons](#), and the [Sexuality and the Law Commons](#)

Recommended Citation

Anthony R. Reeves, *Sexual Identity as a Fundamental Human Right*, 15 Buff. Hum. Rts. L. Rev. 215 (2009).
Available at: <https://digitalcommons.law.buffalo.edu/bhrlr/vol15/iss1/7>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Human Rights Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

SEXUAL IDENTITY AS A FUNDAMENTAL HUMAN RIGHT

Anthony R. Reeves

I. INTRODUCTION

*Simply put, fundamental rights are fundamental rights. They are not defined in terms of who is entitled to exercise them.*¹

—Chief Judge Judith Kaye, Chief Judge, N.Y. Court of Appeals (ret.)

Throughout history, people who failed to conform to societal expectations about sexual identity have been ostracized, imprisoned, and even executed. Early in the twenty-first century, there are signs in many places that things are improving and sexual minorities are being accorded more rights, but they still face controversy and hostility far too often. Sexual minorities encounter aggressive derision, exclusion, and legal sanctions from those who are opposed to “alternative lifestyles.” They are commonly denied rights that are taken for granted by the heterosexual majority, and often they must resort to extensive and costly legal maneuvers to accomplish what for heterosexuals would be simple things requiring little if any legal procedure. Some countries have decriminalized homosexual conduct and enacted statutory and constitutional protections for sexual minorities, while others continue to punish atypical sexual conduct with death.

Believing it is time for sexual minorities to enjoy the same rights and protections enjoyed by other people, I ask in this article whether sexual identity has already been established as a fundamental human right, and if not, why? Part I discusses the problematic situation in which sexual minorities find themselves today. Part II examines human rights as they relate to sexual minorities and analyzes the existing power structure that hinders greater progress. Part III discusses recognized rights and how they are applied vis-à-vis sexual minorities. Part IV examines the status of existing laws throughout the world that protect or repress sexual minorities. And Part V presents proposals for improvement of the status quo.

II. DEFINING THE PROBLEM

On May 25, 1895, at the end of his second criminal trial, a jury found Oscar Wilde guilty of various charges of “gross indecency” with

¹ Hernandez v. Robles, 7 N.Y.3d 338, 382 (2006) (Kaye, C.J., dissenting).

other males.² Justice Willis sentenced Wilde and his co-defendant, Alfred Taylor to two years at hard labor:

[T]he crime of which you have been convicted is so bad that one has to put stern restraint upon one's self to prevent one's self from describing, in language which I would rather not use, the sentiments which must rise to the breast of every man of honour who has heard the details of these two terrible trials. . . .

It is no use for me to address you. People who can do these things must be dead to all sense of shame, and one cannot hope to produce any effect upon them. It is the worst case I have ever tried.³

The most noticeable thing about Justice Willis's speech is his palpable disgust. The *New York Times* report of the sentencing related, "[The judge] was plainly and strongly against the prisoner."⁴ It is curious that an Old Bailey judge would have been so shocked by a non-violent crime that he called it the worst case of his career. Particularly curious are the words, "People who can do these things must be dead to all sense of shame, and one cannot hope to produce any effect upon them." Clearly, to Justice Willis, homosexual acts were horrible crimes.

Justice Willis's sentiments were not new at the time, nor do they appear outdated today. Fred Phelps, pastor of the Westboro Baptist Church in Topeka, Kansas, has said, "Not only is homosexuality a sin, but anyone who supports fags is just as guilty as they are. You are both worthy of death."⁵ In a debate with other Republican presidential candidates on May 3, 2007, former Wisconsin Governor Tommy Thompson said that employ-

² See *THE TRIALS OF OSCAR WILDE* (H. Montgomery Hyde ed., 1973). Wilde actually endured three trials in the spring of 1895. The first trial, April 3–5, was Wilde's prosecution of the Marquess of Queensberry for libel. The trial went quite badly, the Marquess was acquitted, and Wilde was subsequently charged with gross indecency. He was tried in the Central Criminal Court at the Old Bailey in London, April 26–May 1, and the trial ended with a hung jury. Wilde's retrial, his second criminal trial, was May 20–25. He served his two-year prison sentence and was released from prison on May 19, 1897.

³ *Id.* at 339.

⁴ *Oscar Wilde Is a Convict*, N.Y. TIMES, May 26, 1895, available at http://query.nytimes.com/mem/archive-free/pdf?_r=1&res=9B05E3D7133DE433A25755C2A9639C94649ED7CF.

⁵ Wired Strategies, <http://www.wiredstrategies.com/phelps.html> (last visited Feb. 20, 2009).

ers who disapprove of homosexuality should be able to fire gay employees.⁶ In April 2003, a well-known Afrikaans gospel singer, Danie Botha, astonished a South African congregation by saying that gay people will open their eyes in hell.⁷ A Snickers advertisement during the 2007 Super Bowl broadcast drew attention when it featured two men kissing. "I think we just accidentally kissed," said one character, and the other responded, "Quick, do something manly." Each then tore some hair from his chest. Two commercials later, an advertisement for the series "Survivor" had a man saying, "Me and Richard became friends—not in a homosexual way." He felt the need to clarify his heterosexuality for the world. The day after the game, sportswriter King Kaufman commented in his column, "OK, network and advertising people, we get it. Gay is bad. Thanks for the tip."⁸

In April 2008, the European Commission, under pressure from Germany, abandoned plans to protect lesbians and gays against discrimination.⁹ The Commission previously intended to enact a bill against all forms of discrimination on the grounds laid out in Article 13 of the Amsterdam Treaty.¹⁰ The announcement explained the change in strategy: "The commission is afraid that more conservative member states will endanger the unanimity needed by member states."¹¹

On December 18, 2008, sixty-six nations joined in a historic statement that "international human rights protections include sexual orientation and gender identity."¹² This was the first such statement ever presented in

⁶ Queerty.com, Tommy Thompson Ain't Hiring No Gays, <http://www.queerty.com/tommy-thompson-aint-hiring-no-gays-20070504/> (last visited Feb. 20, 2009).

⁷ Neil Cochrane, *Voicing gay experience in South Africa (2002-2005): democratization, minorities and cyberspace*, www.inter-disciplinary.net/ci/sexuality/s2/Neil%20Cochrane%20paper.pdf (last visited Feb. 20, 2009). See also News24.com, http://www.news24.com/News24/Entertainment/Off_Beat/0,9294,2-1225-2107_1443913,00.html (last visited Feb. 20, 2009).

⁸ King Kaufman, *Sports Daily: Colts win Super Bowl XLI. Indy dominates everything but the scoreboard. Plus: Big day for homophobia*, Feb. 5, 2007, <http://www.salon.com/sports/col/kaufman/2007/02/05/monday/> (last visited Feb. 20, 2009).

⁹ Leigh Phillips, *Brussels Abandons Plans to Protect Gays and Lesbians*, Apr. 22, 2008, <http://euobserver.com/9/26023> (last visited Feb. 20, 2009).

¹⁰ *Id.*

¹¹ *Id.*

¹² International Lesbian, Gay, Bisexual, Trans & Intersex Association, *UN: 66 States Condemn Violations Based on Sexual Orientation and Gender Identity*, http://www.ilga.org/news_results.asp?LanguageID=1&FileID=1210&FileCategory=44&ZoneID=7 (last visited Feb. 9, 2009).

the General Assembly.¹³ Argentina read the statement and signatories included such diverse nations as Albania, Cuba, France, Germany, Israel, Japan, Nepal, Serbia, and Venezuela.¹⁴ The United States did not join in the statement.¹⁵

TERMINOLOGY

Terminology is a vexing problem when dealing with the issues discussed in this article. It is especially challenging because people who comprise sexual minorities do not agree about terminology, so it is possible to offend people, sometimes so seriously that they cannot listen objectively, simply by using the “wrong” word. Here, I will attempt to set forth briefly the terminology that I use in the article.

At the outset, it is important to differentiate between *sex* and *gender*. As I use them, the words are not synonymous. Sex refers to a person’s “biological status as male or female.”¹⁶ On the other hand, “[g]ender is a term that is often used to refer to ways that people act, interact, or feel about themselves, which are associated with boys/men and girls/women.”¹⁷

Likewise, *sexual orientation* and *gender identity* are different things. For this article, I adopt definitions of the American Psychological Association (APA), which says, “Sexual orientation refers to an enduring pattern of emotional, romantic, and/or sexual attractions to men, women, or both sexes.”¹⁸ Gender identity, on the other hand, is “the psychological sense of being male or female.”¹⁹ This is distinct from a person’s physical sex, which is predominantly identified by genitalia. The APA defines transgender as “an umbrella term used to describe people whose gender identity (sense of themselves as male or female) or gender expression differs from that usually associated with their birth sex.”²⁰

Two terms I use much are *sexual identity* and *sexual minority*. Sexual identity, as used here, is the composite of sexual orientation, gender

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ AMERICAN PSYCHOLOGICAL ASSOCIATION, ANSWERS TO YOUR QUESTIONS ABOUT TRANSGENDER INDIVIDUALS AND GENDER IDENTITY 1 (2006), available at <http://www.apa.org/topics/transgender.html>.

¹⁷ *Id.*

¹⁸ AMERICAN PSYCHOLOGICAL ASSOCIATION, ANSWERS TO YOUR QUESTIONS FOR A BETTER UNDERSTANDING OF SEXUAL ORIENTATION & HOMOSEXUALITY 1 (2008), available at <http://www.apa.org/topics/orientation.html>.

¹⁹ *Id.*

²⁰ AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 16, at 1.

identity, and physical sex. For example, one may be sexually attracted to females, identify as a male, and have female genitalia. Sexual minority is a blanket term I use to include at least all people with non-heterosexual or uncertain sexual attractions or practices, as well as all who have atypical or uncertain gender identities. A very incomplete list would include homosexuals, bisexuals, asexuals, polysexuals, pansexuals, transsexuals, transvestites, drag performers, intergenderers, androgynous people, bigendered people, and gender queers.²¹

III. RIGHTS AND NORMS

The Dalai Lama, accepting the fourteenth Nobel Peace Prize in 1989, said:

Peace, in the sense of the absence of war, is of little value to someone who is dying of hunger or cold. It will not remove the pain of torture inflicted on a prisoner of conscience. It does not comfort those who have lost their loved ones in floods caused by senseless deforestation in a neighboring country. Peace can only last where human rights are respected, where the people are fed, and where individuals and nations are free.²²

The Dalai Lama's words help put the concept of rights into perspective. Rights are often interdependent and make sense only within the context of other rights. To elaborate on the Dalai Lama's example, the freedom to live openly as a transsexual or homosexual is of little comfort to a person who is starving to death. And a person who is adequately fed and enjoys freedom and liberty still cannot be fulfilled without the liberty to live as herself, and to experience and celebrate the full spectrum of human existence within an intimate relationship that can fulfill her fundamental emotional and sexual needs.

Millions of people in the world cannot have such a fulfilling existence—those who constitute sexual minorities and cannot or will not live as themselves. It is impossible to know how many people are in this predicament because so many nations are in denial or refuse to cooperate, and so many people find life safer if they live “in the closet.”²³ This is tragic, for

²¹ See generally *Id.* and AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 18, at 1.

²² The 14th Dalai Lama, Nobel Lecture, (Dec. 11, 1989), available at http://nobelprize.org/nobel_prizes/peace/laureates/1989/lama-lecture.html.

²³ “Living in the closet” could be inferred from a well known example occurred on September 24, 2007, when Iranian President Mahmoud Ahmadinejad told an

no one should be forced to make the kinds of choices millions of people have to make—choices such as denying one’s sexuality or losing one’s life, which is precisely the choice facing homosexuals in Muslim nations like Iran that punish homosexual activity with death.²⁴ No one should have to choose whether to have satisfying intimate relationships although it means being unemployed and homeless *versus* living without genuine intimacy but having a job and a home, which is precisely the choice potentially facing many people in places that do not prohibit discrimination based on sexual identity. People throughout the world have to choose every day between being honest about who they are on the one hand, and having loving families or practicing the religion of their choice on the other. They face this awful choice because they do not, or cannot, conform to the heterosexual norm.

HUMAN RIGHTS

Human rights are “[t]he freedoms, immunities, and benefits that, according to modern values (esp[ecially] at an international level), all human beings should be able to claim as a matter of right in the society in which they live.”²⁵ A fundamental right is “[a] right derived from natural or fundamental law.”²⁶ Fundamental human rights exist as part of the natural order; particular rights are recognized when circumstances allow them to be perceived. In practice, people pursue claims that are sometimes elevated to their legitimate place as rights.

Human rights began to be recognized in the international forum in the years following World War II. That era saw marked changes in the international legal system: the war crimes trials (e.g., Tokyo Trial, 1946–48; Nuremberg Trial, 1945–46), the adoption of the United Nations Charter (1945), and the adoption of the Universal Declaration of Human Rights (1948). One of the most revolutionary aspects of the end of the war was that the victor nations “applied international law doctrines and concepts

audience at Columbia University, “In Iran we don’t have homosexuals like in your country.” See *‘We don’t have any gays in Iran,’ Iranian president tells Ivy League audience*, THE DAILY MAIL, Sept. 25, 2007, http://www.dailymail.co.uk/pages/live/articles/news/worldnews.html?in_article_id=483746&in_page_id=1811 (last visited Feb. 20, 2009).

²⁴ A recent article in THE TIMES (London) reports that more than 4,000 gay men and lesbians have been executed in Iran since 1979. See Richard Ford & Rajeev Syal, *Gay Iranian Wins Asylum Reprieve*, THE TIMES (London), Mar. 14, 2008, at 15, available at LexisNexis.

²⁵ BLACK’S LAW DICTIONARY 758 (8th ed. 2004).

²⁶ *Id.* at 697.

to impose criminal punishment on individuals for their [wartime] commission of . . . crimes under international law”²⁷

This extraordinary result was made possible by the international adoption of agreements that converted moral imperatives to international law. The documents that reflect these agreements are often called the International Bill of Human Rights (IBHR),²⁸ comprising portions of the United Nations Charter, along with the Universal Declaration of Human Rights (UDHR),²⁹ the International Covenant on Civil and Political Rights (ICCPR),³⁰ and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).³¹ This group of documents established the basic set of human rights norms. Today, the United Nations Human Rights Treaty System has grown to include seven major treaties that have further expanded these norms.³² In mid-2007, “three-quarters or more of United Nations member states [had] ratified [at least] five” of the treaties,³³ reflecting

²⁷ INTERNATIONAL HUMAN RIGHTS IN CONTEXT 115 (Henry J. Steiner & Philip Alston eds., 2d ed. 2008).

²⁸ See Fact Sheet No.2 (Rev.1), The International Bill of Human Rights, *available at* <http://www.unhchr.ch/html/menu6/2/fs2.htm>.

²⁹ See Universal Declaration of Human Rights (10 Dec. 1948), U.N.G.A. Res. 217 A (III) (1948), *available at* <http://www.un.org/Overview/rights.html> [hereinafter UDHR].

³⁰ See International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171, *available at* <http://www2.ohchr.org/english/law/ccpr.htm> [hereinafter ICCPR].

³¹ See International Covenant on Economic, Social, and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3, *available at* http://www.unhchr.ch/html/menu3/b/a_ceschr.htm [hereinafter ICESCR].

³² Office of the United Nations High Commissioner for Human Rights, *Human Rights Treaty Bodies*, <http://www2.ohchr.org/english/bodies/treaty/index.htm> (last visited Feb. 9, 2009). In addition to the ICCPR and ICESCR, the seven include the Convention on the Elimination of all forms of Racial Discrimination, the Convention on the Elimination of all forms of Discrimination Against Women, the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

³³ Eric Engle, *Universal Human Rights: A Generational History*, 12 ANN. SURV. INT’L & COMP. L. 219, 226 (2006). See also International Convention of the Protection of the Rights of All Migrant Workers and their Families New York, 18 December 1990, <http://www2.ohchr.org/english/bodies/ratification/13.htm> (last visited Feb. 9, 2009); Human Rights Bodies, <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> (last visited Feb. 9, 2009).

the widespread international acceptance of the conventions and, hence, of their promulgated norms. Rights recognized in the IBHR and other United Nations treaties have been important in developing human rights law in areas including, among others, equal treatment, freedom from slavery and servitude, freedom from torture, and the right to own property.

Human rights are also recognized through their entrenchment as customary, binding international law by *opinio juris*.³⁴ Ideas and aspirations that begin as nonbinding law can evolve into a rule nations obey because they feel obligated to do so under international law, and when this happens, the ideas have generally become binding law.³⁵ Only a nation that persistently objects to the rights in question can shield itself from being subject to any customary law that develops.³⁶ But this can be difficult for a nation to do if the ideal is widespread and the nation does not want the international community to perceived it as unreasonable or obstructionist. Eric Engle has argued that “[t]he idea of human rights is . . . so attractive[] that it is literally impossible for all but the most tyrannical of states to deny their existence and retain credibility as legitimate expressions of popular will.”³⁷

It is undeniable that decriminalizing homosexual conduct and guaranteeing equal rights has spread through much of the Western world, particularly Europe, over the last thirty years. It is possible that some nations have gone along although neither their people nor their leadership have an enlightened view of sexual minorities,³⁸ but the laws have nonetheless been changed, and societal expectations will develop accordingly. In fact, I believe that no genuine change of attitudes about such a controversial matter is possible unless governments take the initiative to express clear expecta-

³⁴ *Opinio juris sive necessitatis*: “The principle that for conduct or a practice to become a rule of customary international law, it must be shown that nations believe that international law (rather than moral obligation) mandates the conduct or practice.” BLACK’S LAW DICTIONARY 1125 (8th ed. 2004).

³⁵ See generally Jo Lynn Slama, *Opinio Juris In Customary International Law*, 15 OKLA. CITY U. L. REV. 610 (1990).

³⁶ *Id.*

³⁷ Engle, *supra* note 33, at 230. See also Paul W. Kahn, *American Hegemony and International Law Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order*, 1 CHI. J. INT’L L. 12 (2000).

³⁸ For example, complying with the membership requirements of the European Union, which include “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.” See European Commission, http://ec.europa.eu/enlargement/enlargement_process/accession_process/criteria/index_en.htm (last visited Feb. 9, 2009).

tions and ideals by changing laws. In the case of sexual minorities, the reason is heteronormativity.

HETERONORMATIVITY

With all the uncertainty and confusion surrounding the move for expanded rights for sexual minorities, many people are surprised to learn that sexual minorities have existed throughout recorded history on every continent, a fact documented by artifacts and writing from earlier eras.³⁹ Given this longstanding history, the fact that no better accommodation has been found by now demonstrates the depth and strength of the feelings the subject evokes. Whether opponents of rights for sexual minorities invoke morality, tradition, or some other argument, the logic at bottom is often, "It just isn't natural." To better understand why, one must understand heteronormativity.

Human beings like what we know. We like routine, long for security, and want to know who we are and how we fit into the world around us. We like to be with others who are like us. This intrinsic need for the familiar, together with the corresponding fear of what is different or unknown, has led to heteronormativity, or normative heterosexuality. Heteronormativity may be defined as "[t]hose punitive rules (social, familial, and legal) that force us to conform to hegemonic, heterosexual standards for identity."⁴⁰ Put another way, it is: "Those prescribed guides for conduct or action, enforced by punishment, that force us to be similar or identical to the social, cultural, ideological, and economic standards prescribed by sexual desire toward the opposite sex, for our generic character that constitutes the objective reality of what we are."⁴¹

"Heteronormativity stems from the essentialist belief that there are only two sexes—male and female, and that a certain set of behaviours and expectations follow from one's sex."⁴² Sociologist Erin Davis notes that this "dominant gender paradigm constructs two genders as naturally rooted in

³⁹ See generally R. C. Kirkpatrick, *The Evolution of Human Homosexual Behavior*, CURRENT ANTHROPOLOGY, Vol. 41 No. 3, 385 (June 2000). See also Timothy Taylor, *Uncovering the Prehistory of Sex*, BRITISH ARCHAEOLOGY, No. 15 (June 1996), available at <http://www.britarch.ac.uk/ba/ba15/ba15feat.html#taylor>.

⁴⁰ *Terms Used by Theorists of Gender & Sex*, <http://www.cla.purdue.edu/academic/engl/theory/genderandsex/terms/> (last visited Feb. 20, 2009).

⁴¹ Using definitions from MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 577, 584, 616, 1009, 1089, and 1216 (11th ed. 2003).

⁴² Derek Leschasin, *Heteronormativity*, <http://io.uwinnipeg.ca/~taylor/Heteronormativity.htm> (last visited Feb. 9, 2009).

two biologically based sexes.”⁴³ This compelling gender binary enslaves society, because it forces the division of all people (and many things and animals) into male and female gender roles, gender identities, and personal attributes.

The theory of normative heterosexuality proposes that we have learned to associate particular *gender* roles with a particular *sex*—for example, *being a housekeeper* with *female*. We have learned these associations so well that we project them onto every human being, and if a person’s preferred roles fail to agree with his sex as our learned perception dictates they should, trouble often follows. This kind of thinking is, of course, quite limiting. For example, in most of the world housekeeping is typically perceived as a female job, not a male one. According to this perception, males should neither do the work nor want to, but females should do it *and* want to. Many parts of life that touch even tangentially upon housekeeping are specifically defined and limited in terms of female and male; for instance, a large amount of the advertising for dishwashing products targets female consumers.

Heteronormativity and the gender binary exist everywhere, although “[a] small number of nonwestern societies accommodate alternative genders.”⁴⁴ Even residents of “gay ghettos,” where gender roles are often blurred, are never far from the “real” world, and the very fact that their neighborhood is marginalized into a “ghetto” is evidence of the heteronormative society surrounding it and enforcing the marginalization.

In much of the world, heteronormativity is combined with patriarchy, the assignment of authority to the male sex, yielding perhaps the most formidable and exclusive of societal structures, the *heteronormative patriarchy*. Ugandan law professor Sylvia Tamale has explained:

The assumptions that underlie gender relations in patriarchal societies foreground heteronormativity, that is, heterosexuality, as the norm. . . . [Heteronormativity] means that human sexual relations are “normatively” expected to take place between members of the opposite sex. Precisely, it assumes a “natural” hierarchy in sexual relations between a dominant male partner and a subordinate female mate. These assumptions are communicated through various

⁴³ Erin Calhoun Davis, *Situating “Fluidity”: (Trans) Gender Identification and the Regulation of Gender Diversity*, GLQ: A JOURNAL OF LESBIAN & GAY STUDIES, Vol. 15No. 1, 97, 97 (2009)(emphasis omitted).

⁴⁴ *Gender, Alternatives to Binary*, in 3 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 271 (William, A. Darity, Jr. ed., 2d ed., 2008).

means including religion, culture, education, the law, and the media. Women (and men) who resist heterosexuality and subvert dominant culture are subjected to strict punitive laws and discriminatory social discourses.⁴⁵

Heteronormative patriarchy, like heteronormativity, exists everywhere, although in some parts of the Western world it has grown less predominant as women have acquired more rights and expanded their gender roles. Africa, Asia, and parts of Latin America are arguably today's strongholds of heteronormative patriarchy.

SEXUAL MINORITIES IN A HETERONORMATIVE WORLD

The expectations held by sexual minorities emerge—to the extent that they emerge at all—in a legal and social world long built on their subordination and (failed) erasure. These expectations take shape in a context of insults produced by an unrelenting matrix of heterosexual coercion, where the rule for intimate object-choice between persons is cross-sex only. For these minorities, a wide gap exists between their private expectations and public realities, no less crushing and unavoidable for having been socially constructed. Scholarship and criticism can pave the way for a future legal reform to narrow this expectations gap.⁴⁶

The increasing tolerance of sexual minorities has caused a harmful backlash of fear. Not everyone is in favor of the liberalization of attitudes that has emerged in the last twenty-five years. Heteronormativity gives enormous power to heterosexual people. Many of these heterosexuals have been frightened by the recent societal changes and feel helpless to respond. Their fear and helplessness have found outlets in rage, violence, and politicizing against sexual minorities. Professor Jonathan Goldberg-Hiller has observed, "By calling into question the spatial locations of civilization . . . [the] jurisprudence of sexual liberty also upsets common assumptions

⁴⁵ Sylvia Tamale, *Law, Sexuality, and Politics in Uganda: Challenges for Women's Human Rights NGOs* 89 (2008) (unpublished manuscript, on file with the Buffalo Human Rights Law Review).

⁴⁶ José Gabilondo, *Asking the Straight Question: How to Come to Speech in Spite of Conceptual Liquidation as a Homosexual*, 21 WIS. WOMEN'S L.J. 1, 2 (2006).

about the homogeneity of culture.”⁴⁷ I do not mean to suggest that this fear-rage response is in any way a conscious reaction, but anger is a universal human response commonly resulting from fear; hostility and aggression are related emotions that can grow from anger.⁴⁸

Men and women who feel powerful in heteronormative society are secure because they knew how they fit into the world and how their power compares to that of other people. Getting married (to one of the opposite sex), making a home, and rearing a family are all things they perceive as means to the end of happiness, or at least relevance. Achieving these things leads to security. In reality, of course, those things constitute an entrance into the powerful heteronormative world, and when the security of that world is threatened by the idea of admitting as equals people who have not done the correct (i.e., heteronormative) things to earn the privileged status, the “traditional” members scramble to retain the status quo. Michel Foucault wrote, “[I]f repression has indeed been the fundamental link between power, knowledge, and sexuality since the classical age, it stands to reason that we will not be able to free ourselves from it except at a considerable cost”⁴⁹ The cost of freeing ourselves from the heteronormative beast has yet to be determined.

In today’s world, although exceptions to the gender binary are becoming more common, they often encounter hostility. A ready example exists in American schools. “A recent study of California students found that 53% of students said their schools were not safe for guys who aren’t as masculine as other guys, and 34% of students said their schools were not safe for girls who aren’t as feminine as other girls.”⁵⁰ The hostility toward those who are different is not a simple phenomenon, and is complicated by the fact that sexual orientation means different things to different people and different cultures. Eric Heinze, professor of law at Queen Mary, University of London, notes that “Indian hijras, Makassar *kawe kaw*e, Native

⁴⁷ Jonathan Goldberg-Hiller, *Canada Is a Blue State: Global Jurisprudence and Domestic Consciousness in American Gay Rights Discourse*, 1 J. INT’L L. & INT’L REL. 261, 265 (2005).

⁴⁸ See generally William E. Breen, *Anger Experience and Expression in Socially Anxious Individuals After Imagined Social Rejection: Testing the Moderating Role of Experiential Avoidance* (2009) (unpublished Ph.D. dissertation, George Mason University) (on file with the Buffalo Human Rights Law Review), available at ProQuest Dissertations and Theses, Vol. 0622No. 0883.

⁴⁹ MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY*, VOL. 1: AN INTRODUCTION 5 (Robert Hurley trans., Vintage Books 1990) (1978).

⁵⁰ STEPHANIE CHO, ET AL., GAY-STRAIGHT ALLIANCE NETWORK, *BEYOND THE BINARY: A TOOL KIT FOR GENDER IDENTITY ACTIVISM IN SCHOOLS* 1 (2004).

American berdaches, homosexual South African mine workers, and Euro-American gays have lived and understood themselves differently.”⁵¹ All sexual minorities understand themselves differently, as groups and as individuals. The perpetual problem is, however these people might understand themselves, most of the heteronormative society around them perceives them differently. For example, a Western gay man may want only to find someone with whom to share love and life, but much of society sees or perceives him as an undesirable aberration or even as a threat to its way of life. What seems natural and perhaps unremarkable to the person who is “different” simultaneously can seem deviant, and maybe outrageous, to others.

Given this perspective, it becomes clearer that the only way to achieve eventual general acceptance of those who live outside the gender binary, who defy heteronormative patriarchy, is for governments to be proactive and enact laws that guarantee the freedom to live openly whatever one’s sexual identity may be, and that guarantee equality of opportunity and rights for sexual minorities.

HETERONORMATIVE POWER IN THE WESTERN WORLD

United States

The American heteronormative power structure has a mighty arsenal to defend its position. For example, nongovernmental penalties for failing to conform to the norm can be massive. The threat of massive socioeconomic loss faces those who fail to conform to the heterosexual power model. For example, nonconformists may lose the love and companionship of family and friends. They may lose gifts and inheritances, and—in many places—jobs and homes. Numerous penalties are associated with religion. Nonconformist people may be excluded or formally expelled from their churches, faith communities, and places of worship. Worse, they may be coerced back into the closet in the ostensible hope of “being saved from eternal condemnation.” Under threat of ostracism or worse, nonconformists may face intense pressure to enter purported treatment programs designed to help people repress or disguise sexuality or gender identity and assume a socially acceptable, heteronormative identity.

Governmental strictures and penalties can be devastating. In some places, homosexual parents can lose custodial rights to their children. Certain property rights may be forfeited, social security and retirement benefits

⁵¹ ERIC HEINZE, *SEXUAL ORIENTATION: A HUMAN RIGHT* 77 (1995).

may be severely impacted, and people who want to serve in the military are not allowed to do so.⁵²

Marriage, of course, is almost never possible. In the United States, it has been estimated that marriage confers approximately 1,400 benefits on the marital partners.⁵³ These benefits are denied to everyone who does not fit the normative heterosexual paradigm that is a prerequisite to marriage in almost every state.⁵⁴ Even in the few states that accommodate same-sex couples, approximately 1,000 of the 1,400 marital benefits remain unavailable because the Federal government, which does not recognize same-sex marriage under any circumstances, administers those 1,000 benefits.⁵⁵

In *Lawrence v. Texas*,⁵⁶ the United States Supreme Court decided that states could not maintain statutes that criminalized homosexual conduct between consenting adults. Justice Anthony Kennedy acknowledged some of these problems, and observed that they are largely the result of powerful voices “that for centuries . . . [have] condemn[ed] homosexual conduct as immoral.”⁵⁷ Justice Kennedy stated that “[t]he condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family.”⁵⁸ Justice Kennedy astutely observed, “These considerations do not answer the question before us, however. The issue is *whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law.*”⁵⁹ While the Court held in *Lawrence* that such state power had limits, it has nonetheless left most such power undisturbed.

It would be a serious error to assume that the defenders of heteronormativity in America are all “old White people.” Immigrants and their progeny who are from areas of the world where heteropatriarchal lifestyles still dominate tend to be quite reluctant to abandon what they perceive as their cultural and moral standards. Religion is often a factor: “Each ethnic group has its own expression of religion that is unique to that particular

⁵² See generally Emily Brandon, *Marriage and Social Security Benefits*, U.S. NEWS & WORLD REPORT, Jan. 9, 2008, available at <http://www.usnews.com/articles/business/retirement/2008/01/09/marriage-and-social-security-benefits.html>.

⁵³ ReligiousTolerance.org, *Legal and economic benefits of marriage*, http://www.religioustolerance.org/mar_bene.htm (last visited Feb. 20, 2009).

⁵⁴ A few states offer civil unions with comparable legal status to marriage, and Massachusetts allows same-sex couples to be married. See *infra* p. 53 and note 253.

⁵⁵ *Id.*

⁵⁶ *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁵⁷ *Id.* at 571.

⁵⁸ *Id.*

⁵⁹ *Id.* (emphasis added).

population, and many of these expressions are harshly critical of LGBTs”⁶⁰ The circumstances in which immigrant families enter and live in this country are also a factor. Eithne Luibhéid, a leading scholar in women’s studies, has noted, “Heteronormative policies and practices—which subordinate immigrants not just on grounds of sexual orientation but also on grounds of gender, racial, class, and cultural identities that may result in ‘undesirable’ sexual acts or outcomes (such as ‘too many’ poor children)—are deployed by the state to select who may legally enter the United States and to incorporate immigrants into hegemonic nationalist identities and projects.”⁶¹ Asian-American historian Judy Tzu-Chun Wu states, “In Asian American history, the tendency to accept heterosexuality unquestioningly as the norm is linked to the field’s critique of racially motivated intrusions on the construction of family. . . . [It] is premised upon unexamined assumptions of certain forms of family and hence sexual behavior as being naturally desirable.”⁶²

Many scholars believe that African American communities hold particularly fast to their heteronormative heritage. “[F]ears of the consequences of straying from normative models have only been magnified by the prominent role of the black church in African American communities. . . . [T]he situation for LGBT members of African American families is uniquely affected by the role of the black church in promoting an uncommonly virulent strain of homophobia.”⁶³ This alleged characteristic of the African-American community resulted in considerable blaming of African Americans for the passage of California’s Proposition 8 in 2008, an assertion that others have vigorously challenged.⁶⁴

⁶⁰ Michael Bennett and Juan Battle, “*We Can See Them, But We Can’t Hear Them:*” *LGBT Members of African American Families*, in *QUEER FAMILIES QUEER POLITICS: CHALLENGING CULTURE IN THE STATE* 53, 58 (Mary Bernstein and Renate Reimann eds., 2001).

⁶¹ Eithne Luibhéid, *Heteronormativity and Immigration Scholarship: A Call for Change*, *GLQ: A JOURNAL OF LESBIAN AND GAY STUDIES* Vol. 10 No. 2, 227, 227 (2004).

⁶² Judy Tzu-Chun Wu, *Asian American History and Racialized Compulsory Deviance*, *J. WOMEN’S HIST.* Vol. 15 No. 3, 58-62 (2003).

⁶³ Bennett & Battle, *supra* note 60, at 58.

⁶⁴ See Byron York, *Black Voters Save Proposition 8*, *NATIONAL REVIEW ONLINE*, Nov. 5, 2008, available at <http://corner.nationalreview.com/post/?q=YWEyMDc2YmNiMTJkOTI0YjdjNjAwYmE4YzUzZGU3NTU=>. See also Southern California Public Radio, *African-Americans Largely Supported Propositions*, http://www.scpr.org/news/stories/2008/11/07/08_minorities_eight_110.html (last visited Feb. 20, 2009) (“A CNN exit poll shows that the amendment to ban same-sex marriage

The influence of our heteronormative orientation is clearly visible in court decisions of the last three decades. For example, in *Hernandez v. Robles*,⁶⁵ the New York Court of Appeals used a “welfare of the children” argument to hold that “the New York Constitution does not compel recognition of marriages between members of the same sex. Whether such marriages should be recognized is a question to be addressed by the Legislature.”⁶⁶

The petitioners argued that New York statutes, which allow only opposite-sex marriages, violated the due process and equal protection clauses of the New York Constitution.⁶⁷ The Court applied a rational basis test and determined that “at least two grounds” rationally supported the state laws limiting marriage to opposite-sex couples, “both of which are derived from the undisputed assumption that marriage is important to the welfare of children.”⁶⁸ The grounds that were cited were classic heteronormative reasons: (1) “for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships;”⁶⁹ and (2) “it is better, other things being equal, for children to grow up with both a mother and a father.”⁷⁰ The Court was operating under the unverified assumption that heterosexuals make better parents than non-heterosexuals.

New York Chief Judge Judith Kaye dissented from the Court’s opinion in *Hernandez*. First, she disagreed with the rational basis standard the Court’s majority used in upholding the statute:

[T]he right to due process of law protects certain fundamental liberty interests, including the right to marry. Central to the right to marry is the right to marry the person of

split white, Latino, and Asian-American voters roughly 50/50. But 70 percent of African American voters favored Prop 8.”). Many people, however, have challenged such allegations. See, e.g., John Wildermuth, *Black Support for Prop. 8 Called Exaggeration*, SAN FRANCISCO CHRONICLE, Jan. 7, 2009, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/01/06/BANB154OS1.DTL>. Proposition 8 was a voter initiative to amend the California Constitution to “eliminate[the] right of same-sex couples to marry.” Official Voter Information Guide, <http://www.voterguide.sos.ca.gov/title-sum/prop8-title-sum.htm> (last visited Feb. 20, 2009). Proposition 8 passed with approximately 52% of the vote.

⁶⁵ *Hernandez v. Robles*, 7 N.Y.3d 338 (N.Y. 2006).

⁶⁶ *Id.* at 356.

⁶⁷ *Id.* at 358.

⁶⁸ *Id.* at 359.

⁶⁹ *Id.*

⁷⁰ *Id.*

one's choice. The deprivation of a fundamental right is subject to strict scrutiny and requires that the infringement be narrowly tailored to achieve a compelling state interest.⁷¹

In this brief passage, Chief Judge Kaye also managed to frame the right to marry the person of one's choice as a fundamental right, and took the Court to task: "The Court concludes, however, that same-sex marriage is not deeply rooted in tradition, and thus cannot implicate any fundamental liberty. But fundamental rights, once recognized, cannot be denied to particular groups on the ground that these groups have historically been denied those rights."⁷² She further argued, "It is no answer that same-sex couples can be excluded from marriage because 'marriage,' by definition, does not include them. In the end, 'an argument that marriage is heterosexual because it 'just is' amounts to circular reasoning.'"⁷³

Judge Kaye also discussed the importance of the benefits denied same-sex people by denying their right to marry:

Unlike married spouses, same-sex partners may be denied hospital visitation of their critically ill life partners. They must spend more of their joint income to obtain equivalent levels of health care coverage. They may, upon the death of their partners, find themselves at risk of losing the family home. . . . Same-sex families are, among other things, denied equal treatment with respect to intestacy, inheritance, tenancy by the entirety, taxes, insurance, health benefits, medical decisionmaking, workers' compensation, the right to sue for wrongful death and spousal privilege. Each of these statutory inequities . . . violates [same-sex couples'] constitutional right to equal protection of the laws.⁷⁴

She also framed the central issue differently than the majority opinion did: "[T]he question before [the Court] is not whether the marriage statutes properly benefit those they are intended to benefit—any discriminatory classification does that—but whether there exists any *legitimate* basis for excluding those who are not covered by the law."⁷⁵ Judge Kay then noted that the disputed statutes, which effectively prohibit same-sex marriage, dis-

⁷¹ *Id.* at 380 (citations omitted).

⁷² *Id.* at 381.

⁷³ *Id.* at 385, quoting *Halpern v. Attorney Gen. of Can.*, 65 O.R.3d 161, 172 O.A.C. 276, ¶ 71 (2003).

⁷⁴ *Id.* at 386.

⁷⁵ *Id.* (emphasis added; emphasis removed from "excluding").

criminate “[o]n three independent grounds”:⁷⁶ sexual orientation discrimination,⁷⁷ sex discrimination,⁷⁸ and fundamental right.⁷⁹ Judge Kaye argued that “th[ese] discriminatory classification[s] [are] subject to heightened scrutiny, a test that defendants concede it cannot pass.”⁸⁰

The argument that children do better with parents of opposite sexes is an old one, but one that simply is not supported by objective, reliable evidence. Neither same-sex marriage nor gay adoption have been legal anywhere long enough for broad information and data to be gathered and analyzed by objective parties.⁸¹ Hawai’i Circuit Judge Gary Chang responded to the same argument in 1996 with the observation, “[T]here is diversity in the structure and configuration of families . . . [but] [t]he evidence presented . . . establishes that the single most important factor in the development of a happy, healthy and well-adjusted child is the nurturing relationship between parent and child.”⁸² A significant amount of the data that is beginning to accumulate suggests that Judge Chang was correct. Some studies, for example, have shown that the children of single heterosexual parents “have more difficulties than children who have parents of the same sex.”⁸³ The American Psychological Association, in an official policy statement, has declared: “[R]esearch has shown that the adjustment, development, and psychological well-being of children is unrelated to parental sexual orientation and that the children of lesbian and gay parents are as likely as those of heterosexual parents to flourish.”⁸⁴

⁷⁶ *Id.*

⁷⁷ *Id.* at 387.

⁷⁸ *Id.* at 389.

⁷⁹ *Id.* at 390.

⁸⁰ *Id.* at 386.

⁸¹ See B.A. Robinson, *Same-sex marriage (SSM): How do children fare in families led by same-sex parents?*, ONTARIO CONSULTANTS ON RELIGIOUS TOLERANCE, Oct. 26, 2004, http://www.religioustolerance.org/hom_mar13.htm.

⁸² *Baehr v. Miike*, 1996 WL 694235, at ¶ 17 (Hawai’i Cir. Ct. 1996).

⁸³ *Study: Same-Sex Parents Raise Well-Adjusted Kids*, WEBMD HEALTH NEWS, Oct. 12, 2005, <http://www.webmd.com/mental-health/news/20051012/study-same-sex-parents-raise-well-adjusted-kids> (last visited Jan. 30, 2009).

⁸⁴ Ruth U. Paige, *Proceedings of the American Psychological Association for the Legislative Year 2004: Minutes of the Annual Meeting of the Council of Representatives, February 20-22, 2004, Washington, DC, and July 28 and 30, 2004, Honolulu, Hawaii, and Minutes of the February, April, June, August, October, and December 2004 Meetings of the Board of Directors.*, AMERICAN PSYCHOLOGIST, Vol. 60 No. 5, 436, PINCITE (2005), available at <http://www.apa.org/pi/lgbcl/policy/parents.html>.

Outside the United States

Heteronormativity is also powerful in the Western world outside the United States. For example, in *Salgueiro da Silva Mouta v. Portugal*,⁸⁵ it is easy to see the influence of heteronormative thinking on the Portuguese Court of Appeal. Applicant Salgueiro da Silva Mouta married a woman in 1983, and they had a daughter in 1987. The couple separated in 1990 and divorced 1993. The husband, who was gay, moved in with another man. In 1991, after the separation, they signed an agreement awarding parental responsibility to the mother with the father retaining contact (visitation) rights. But the mother subsequently would not allow the father to visit his daughter.⁸⁶

In 1992, the father sued for parental responsibility for the child, arguing that the mother failed to comply with the custody agreement and that he was in a better position to look after their child. In her reply, the mother accused the applicant's live-in boyfriend of having sexually abused the child.⁸⁷ After an investigation, the Lisbon Family Affairs Court in 1994 awarded parental responsibility to the father and dismissed the mother's allegations of sexual abuse as unfounded.⁸⁸

A year later, the mother abducted the child.⁸⁹ The father reported the abduction and instituted criminal proceedings,⁹⁰ but the Lisbon Court of Appeal reversed the lower court and awarded parental responsibility to the mother.⁹¹ The Court of Appeal stated that mothers should have custody of young children unless there were overriding reasons to the contrary, and that custody should definitely be with the mother in this case because the child should live in a traditional Portuguese family.⁹² Homosexuality, the Court found, was an abnormality, and children should not grow up in abnormal situations.⁹³

The father appealed to the European Commission on Human Rights (which has been replaced by the European Court of Human Rights, in-

⁸⁵ *Salgueiro da Silva Mouta v. Portugal*, App. No. 33290/96 Eur. Comm'n H.R. (1999), available at <http://www.echr.coe.int/echr/> (follow "{Case-law}" hyperlink; then follow "HUDOC" hyperlink).

⁸⁶ *Id.* at ¶ 10.

⁸⁷ *Id.* at ¶ 11.

⁸⁸ *Id.* at ¶ 12.

⁸⁹ *Id.* at ¶ 13.

⁹⁰ *Id.*

⁹¹ *Id.* at ¶ 14.

⁹² *Id.*

⁹³ *Id.*

terchambeably, the “ECHR”), which found that “the Court of Appeal made a distinction based on considerations regarding the applicant’s sexual orientation, a distinction which is not acceptable under the Convention [for the Protection of Human Rights and Fundamental Freedoms].”⁹⁴ The ECHR stated that it could find no “reasonable relationship of proportionality . . . between the means employed and the aim pursued,” so there was a violation of the father’s right to respect for privacy and family life.⁹⁵

HETERONORMATIVE POWER OUTSIDE THE WESTERN WORLD

The non-Western world remains largely under the control of patriarchal heteronormativity. Several important factors make Asia and Africa especially prone to retaining this oppressive regime, including the traditional way of life, the slow progress of women’s rights, and the stubborn, lingering influence of European colonialization. “Precolonial societies in Africa were not immune to manipulating culture to oppress women,” writes Sylvia Tamale.⁹⁶ “Likewise, the Judeo-Christian and Arabic-Islamic cultures imposed a particular sexuality on African women as ‘hyperdeveloped’ and in need of control. This cultural construction facilitated the consolidation of the patriarchal colonial state. In a postcolonial context, the legacies of these two sociopolitical formations impose a variety of gendered constructs on the African woman.”⁹⁷

It may be impossible for many Americans to achieve a real understanding of the complexities of these cultures. For example, while state-sponsored violence toward sexual minorities is rare in the West, this is not so elsewhere in the world. “In some countries, state violence flows from laws that continue to criminalize homosexuality, particularly in postcolonial governments of South Asia, Africa, and the Caribbean—many still preserving British laws now abandoned by the United Kingdom itself—and Islamic governments of the Arab world, Southwest Asia, and Malaysia.”⁹⁸ In addition, in many non-western societies, same-sex physical relationships are considered quite distinct from romantic liaisons. “Casual contacts between non-homosexual identified males that remain common in those cultures

⁹⁴ *Id.* at ¶ 36.

⁹⁵ *Id.* at ¶ 22.

⁹⁶ Tamale, *supra* note 45, at 82-83.

⁹⁷ *Id.* at 83.

⁹⁸ Barry D. Adam, *Homophobia and Heterosexism*, in BLACKWELL ENCYCLOPEDIA OF SOCIOLOGY (George Ritzer ed. 2007), available at http://www.blackwellreference.com/subscriber/tocnode?id=G9781405124331_chunk_g978140512433114_ss1-43.

[most of Latin America, Africa, and the Arab world] will often express a power difference, or be accompanied by a financial transaction.”⁹⁹

Islam has held very tightly to its heteronormative roots. The reason may have to do with the fact that the Qur’an arguably decries homosexuality even more unequivocally than the Hebrew and Christian scriptures do. As Nicole Kligerman explains, “The Qur’an is very explicit in its condemnation of homosexuality, with very few loopholes with which to theologically condone gays in Islam.”¹⁰⁰ Anthropologist Tom Boellstorff has observed, “In contemporary Islamic law, as in contemporary Western law, ‘husband and wife [are] established as the core intimate relationship around which law, politics, and policy revolve.’”¹⁰¹ The predominant belief in Islam, similar to much of evangelical Christianity, seems to be that atypical sexual or gender identities are strongly influenced by environment.¹⁰² One popular website, *Investigating Islam*, claims:

Humans are not homosexuals by nature. People become homosexuals because of their environments. Particularly critical is the environment during puberty. Suggestions, ideas [and] strange dreams are symptoms of confused attempts to understand new and blunt sexual desires and are rashly interpreted as defining someone as being one sexuality or another. . . .

Sexuality is a choice of identity which follows choices of action which follow from choices of what to have sexual fantasies about. . . .

The truth is—you are what you choose to be; you do what you choose to do; you think what you choose to think. . . .

[A]nyone can change themselves. There are reformed ex-drug addicts, reformed ex-compulsive gamblers and ex-

⁹⁹ Gert Hekma, *Homosexuality*, in BLACKWELL ENCYCLOPEDIA OF SOCIOLOGY (George Ritzer, ed. 2007), available at http://www.blackwellreference.com/subscriber/tocnode?id=G9781405124331_chunk_g978140512433114_ss1-44.

¹⁰⁰ Nicole Kligerman, *Homosexuality in Islam: A Difficult Paradox*, MACALESTER ISLAM J., Vol. 2 No. 3, 52, 53 (2007) (developing thesis that while the Qur’an explicitly condemns homosexuality, in traditional Islamic societies, the acts themselves were not condemned as long as they were behind closed doors).

¹⁰¹ Tom Boellstorff, *Domesticating Islam: Sexuality, Gender, and the Limits of Pluralism*, LAW & SOCIAL INQUIRY, Vol. 31 No. 4, 1035, 1045 (2006), quoting MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 1 (1995).

¹⁰² See, e.g., What is Islam’s view of homosexuality?, <http://www.islamic.org.uk/homosex.html> (last visited Jan. 30, 2009).

homosexuals. In all these sins prevention is 1000 times better than cure and much easier.¹⁰³

But exceptions to these extreme ideas exist in Islamic thought. Another website reports, "Some self-described liberal Muslims accept and consider homosexuality as natural. . . . However, this position remains highly controversial even amongst liberal movements within Islam, and is considered completely beyond the pale by mainstream Islam."¹⁰⁴

In most Islamic nations, homosexual conduct is still a crime.¹⁰⁵ Penalties range from a fine and/or flogging to death.¹⁰⁶ No predominantly Islamic nations joined a December 2008 historic statement in the United Nations General Assembly that condemned human rights abuses against sexual minorities.¹⁰⁷ In fact, immediately after that statement, the Syrian delegation presented an opposing statement on behalf of fifty-seven nations, most of which had a significant Muslim population.¹⁰⁸ Although the statement condemned "all forms of stereotyping, exclusion, stigmatization, prejudice, intolerance and discrimination and violence directed against peoples, communities and individuals on any ground whatsoever, wherever they occur," it specifically excluded "the so-called notions of sexual orientation and gender identity."¹⁰⁹

IV. EXISTING RIGHTS AND SEXUAL MINORITIES

Essential documents, such as those in the International Bill of Human Rights, recognize fundamental rights like equality, privacy, and liberty. Many national constitutions and statutes recognize these rights and others like them, such as the right to be free from sex discrimination. So a legitimate question is whether sexual minorities' rights have already been recognized, since sexual minorities are already protected by the same laws

¹⁰³ *Id.*

¹⁰⁴ *Homosexuality and Islam*, available at <http://www.religionfacts.com/homosexuality/islam.htm#5>.

¹⁰⁵ See generally DANIEL OTTOSSON, STATE-SPONSORED HOMOPHOBIA: A WORLD SURVEY OF LAWS PROHIBITING SAME SEX ACTIVITY BETWEEN CONSENTING ADULTS (2008).

¹⁰⁶ See generally *id.*

¹⁰⁷ International Lesbian, Gay, Bisexual, Trans & Intersex Association, *supra* note 12.

¹⁰⁸ Michael Nugent, UN Split on Protecting Gay Rights, HAPPINESS, <http://www.michaelnugent.com/2008/12/21/un-split-on-protecting-gay-rights/> (last visited Mar. 1, 2008).

¹⁰⁹ *Id.*

that protect everyone else. Professor Debra DeLaet, who teaches human rights and international law, has observed, "A variety of provisions in these core documents could provide protection . . . if international human rights law were expanded to preclude discrimination on the grounds of sexual orientation."¹¹⁰ I will argue, however, that even if human rights law were so expanded, laws explicitly protecting sexual minorities would still be required to achieve the necessary ultimate change in attitudes.

EXISTING LAWS THAT SOMETIMES PROTECT SEXUAL MINORITIES

The existing laws used to protect sexual minorities are generally constitutional provisions, antidiscrimination statutes, and asylum laws.

The last thirty-seven years have unquestionably brought impressive progress in recognition of the rights of sexual minorities, largely accomplished under laws that apply to everyone. Numerous writers have argued that discrimination because of sexual identity is already prohibited, since the IBHR documents and numerous national statutes and constitutions contain protections against sex discrimination. For example, Maria Pronk has observed:

Discrimination on the grounds of 'sex' is often the consequence of a sort of behavior which is not in conformity with what is regarded as the normal gender roles. If the prohibition of discrimination implies that discrimination on the grounds of sex is forbidden, then it follows that there can be no such thing as a standard behavioural pattern being attached to gender. Discrimination on the grounds of homosexuality . . . could fall under discrimination on the grounds of sex, and could therefore be forbidden.¹¹¹

And Eric Heinze has stated, "'Sex' need not simply be reduced to 'gender' . . . [or] to differences between men and women, or . . . to discrimination by men against women. Rather, it could include any kind of discrimination arising from sexuality, sexual behavior, or sexual norms."¹¹² This argument is strong, and finds further support in many dictionary definitions of "sex." For instance, one dictionary says sex is "the sum of the structural, functional, and behavioral characteristics of organisms that are involved in re-

¹¹⁰ Debra L. DeLaet, *Don't Ask, Don't Tell: Where Is the Protection Against Sexual Orientation Discrimination in International Human Rights Law?*, 7 LAW & SEXUALITY 31, 36 (1997).

¹¹¹ MARIA PRONK, *HOMOSEXUALITY AND INTERNATIONAL LAW*, 1985 IGA Pink Book, 12, 17 (1985).

¹¹² HEINZE, *supra* note 51, at 217.

production marked by the union of gametes and that distinguish males and females,” as well as “sexually motivated phenomena or behavior.”¹¹³

There are some early signs of acceptance for this kind of thinking. In *Toonen v. Australia*, the United Nations Human Rights Committee (HRC) considered Australia’s question “whether sexual orientation may be considered an ‘other status’ for the purposes of article 26.”¹¹⁴ The HRC stated, “[T]he reference to ‘sex’ in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation.”¹¹⁵ Likewise, the United States Supreme Court (SCOTUS), in *Oncale v. Sundowner Offshore Services, Inc.*, held that “nothing in Title VII necessarily bars a claim of discrimination because of sex merely because the plaintiff and the defendant . . . are of the same sex.”¹¹⁶

Asylum laws have been used to help sexual minorities, but establishing a claim based on sexual minority discrimination can be challenging. The UDHR asseverates, “Everyone has the right to seek and to enjoy in other countries asylum from persecution.”¹¹⁷ But as human rights experts David Weissbrodt and Connie de la Vega have observed, “Persecution for membership in a particular social group is the least well defined or most open-ended of the five grounds for refugee status.”¹¹⁸ The United States can be a particularly difficult place for sexual minorities to establish asylum claims, although it is possible. The Ninth Circuit Court of Appeals, for instance, has “ruled that gay men in Mexico with female sexual identities constitute a ‘particular social group’ for purposes of establishing eligibility for asylum.”¹¹⁹

A recent example of the difficulty of establishing such an asylum claim is the case of Mehdi Kazemi, a 19-year-old Iranian man who went to London to study English in 2004 and subsequently discovered that his boyfriend in Iran had been arrested by police, charged with sodomy, and

¹¹³ MERRIAM-WEBSTER, *supra* note 41, at 1140.

¹¹⁴ Human Rights Committee, *Toonen v. Australia* (Communication No. 488/1992, 31 March 1994), at ¶ 8.7.

¹¹⁵ *Id.*

¹¹⁶ *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998) (internal quotation marks omitted).

¹¹⁷ UDHR, *supra* note 29, art. 14.

¹¹⁸ DAVID WEISSBRODT & CONNIE DE LA VEGA, *INTERNATIONAL HUMAN RIGHTS LAW: AN INTRODUCTION* 77 (2007).

¹¹⁹ *Id.* at 77-78. See *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000).

hanged.¹²⁰ Kazemi's father told him that before his April 2006 execution, police questioned the boyfriend about his sexual relations with other men and he named Kazemi as his partner.¹²¹ Fearing his own arrest and execution if he returned to Iran, Kazemi applied for sanctuary in the United Kingdom.

British courts refused to grant Kazemi asylum late in 2007, and he fled Britain for Holland because the Netherlands has special protections for gay Iranians.¹²² But Dutch authorities detained Kazemi upon his arrival, and on March 5, 2008, he appeared in a Dutch court asking not to be returned to Britain.¹²³ The court ruled, however, that since Kazemi originally applied for asylum in Britain, he had to return there.¹²⁴ Under tremendous public and political pressure, the British government allowed him to return.¹²⁵ Sixty-three members of the House of Lords signed a letter to Home Secretary Jacqui Smith, stating in part, "We are deeply concerned at the possible execution of Mehdi Kazemi if he is refused asylum in the UK and is deported to Iran."¹²⁶ Lord Roberts of Llandudno wrote an article in *The Independent*, in which he argued Kazemi's case:

Iran is a country where the penal code prescribes execution by stoning and dictates the stones be large enough to cause pain but not so large as to kill immediately. This is the law of Iran. As such we cannot turn to the law of Iran to guide us. Can we turn to international law?

The UN safeguards guaranteeing protection rights for those facing the death penalty, clarified in Resolution 2005/59 of the Commission on Human Rights, says clearly the death penalty should not be imposed for non-violent acts such as sexual relations between consenting adults.

. . . .

¹²⁰ See generally Robert Verkaik, *A life or death decision*, THE INDEPENDENT, Mar. 6, 2008, <http://www.independent.co.uk/news/uk/home-news/a-life-or-death-decision-792058.html>.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Luke Baker, *Gay Iranian granted asylum reprieve*, REUTERS UK, March 13, 2008, <http://uk.reuters.com/article/UKNews1/idUKL1383983920080313>.

¹²⁵ *Id.*

¹²⁶ *Id.*

This is a matter of avoiding a breach of international law but, more than that, it is a matter of not sending a 19-year-old man, who has hurt nobody, to his death.

There is only one ethical course of action for the British government to take. A moratorium on removals to Iran for all those who fear execution.¹²⁷

The Netherlands refused Kazemi's application because the 2003 Dublin Convention does not allow applications for asylum in more than one European Union nation, but the reasons for the original British refusal of Kazemi's application are unclear. Fortunately, the British government finally grasped the reality of Kazemi's situation and granted him asylum in May 2008.¹²⁸

OTHER RIGHTS

When considering the rights of sexual minorities, most judicial fora have tended to use some combination of three clearly recognized fundamental rights: privacy, liberty, and equality.

Privacy

The UDHR and ICCPR establish the right to privacy as a norm of international law,¹²⁹ and legal systems throughout the world enshrine a privacy right in their constitutions. An interesting exception is the United States, where the Constitution contains no such explicit right. The right to privacy was a subject of speculation and debate for many years until 1965, when in *Griswold v. Connecticut*, the Supreme Court recognized the right: "[T]he First Amendment has a penumbra where privacy is protected from governmental intrusion," wrote Justice William O. Douglas.¹³⁰ Many of the most important decisions of world courts affirming rights for sexual minorities have been founded on the right to privacy.

The concept of a privacy right varies from place to place. Eric Heinze, who has noted that the right differs in some aspects "[f]rom culture

¹²⁷ *Lord Roberts of Llandudno: There is only one ethical course for the British Government*, THE INDEPENDENT, Mar. 28, 2008, <http://www.independent.co.uk/opinion/commentators/lord-roberts-of-llandudno-there-is-only-one-ethical-course-for-the-british-government-801744.html>.

¹²⁸ *Britain Grants Asylum to Gay Iranian Student*, THE CNN WIRE, May 20, 2008, <http://cnwire.blogs.cnn.com/2008/05/20/britain-grants-asylum-to-gay-iranian-student/>.

¹²⁹ See UDHR, *supra* note 29, art. 12; ICCPR, *supra* note 30, art. 17.

¹³⁰ *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

to culture,”¹³¹ has deduced two of its most common aspects: “a right to choose the way in which, and the people with whom, one seeks to pursue intimacy” and “a ‘spatial aspect,’ exemplified by, but not limited to, the home.”¹³² Heinze contends that “these two aspects establish a comprehensive zone of legal protections.”¹³³

The right to privacy has been used to justify decriminalizing homosexual conduct. In the first important decision by the European Court of Human Rights (ECHR) to recognize the rights of sexual minorities, *Dudgeon v. United Kingdom*, the Court held that Northern Ireland’s laws criminalizing homosexual acts infringed on Mr. Dudgeon’s privacy rights.¹³⁴ Likewise, in two succeeding cases, *Norris v. Ireland* and *Modinos v. Cyprus*, the ECHR ruled against national laws and in favor of homosexual petitioners on privacy grounds.¹³⁵

*Dudgeon*¹³⁶ was the first major decision anywhere to affirm the rights and protections of sexual minorities. The ECHR held that a “sodomy law” criminalizing consensual homosexual conduct in Northern Ireland violated the privacy protections of Article 8 of the European Convention on Human Rights. The applicant, Jeffrey Dudgeon, was a thirty-five-year-old homosexual shipping clerk who lived in Belfast. In January 1976, police searched Mr. Dudgeon’s flat in connection with a drug investigation, found marijuana, and charged another person with drug crimes. But during the search, police also discovered and seized personal papers belonging to Dudgeon that described his homosexual activities, and questioned him about his sex life for more than four hours. Authorities ultimately decided not to bring charges, but did not inform Dudgeon of the decision or return his papers until February 1977, thirteen months after the search.

Northern Ireland’s statutes criminalizing homosexual acts between consenting adult males dated from the nineteenth century.¹³⁷ The penalties for infringement ranged from life imprisonment for “buggery” (anal inter-

¹³¹ HEINZE, *supra* note 51, at 172.

¹³² *Id.* at 173.

¹³³ *Id.*

¹³⁴ *Dudgeon v. United Kingdom*, App. No. 7525/76, 45 Eur. Ct. H.R. (1981).

¹³⁵ *Norris v. Ireland*, App. No. 10581/83 Eur. Ct. (1991); *Modinos v. Cyprus*, App. No. 15070/89 Eur. Ct. H.R. (1993). Both cases involved breaches of Article 8 of the European Convention on Human Rights (1950), which states in pertinent part, “Everyone has the right to respect for his private and family life, his home and his correspondence.”

¹³⁶ *Dudgeon*, App. No. 7525/76 at ¶ 33.

¹³⁷ *Id.* at 14. The Offences against the Person Act (1861) and the Criminal Law Amendment Act (1885).

course) to two years for “gross indecency” (oral sex or mutual masturbation). Homosexual acts between females were not illegal. While the laws originally applied throughout the United Kingdom, they were revoked everywhere except Northern Ireland in 1967. Dudgeon complained that under the law of Northern Ireland, homosexual conduct could subject him to criminal prosecution, and that he had resultantly experienced fear, suffering, and psychological distress. This, he contended, constituted a breach of his privacy rights under Article 8 of the European Convention on Human Rights.¹³⁸ The ECHR recognized that “the cardinal issue arising under Article 8 . . . is to what extent, if at all, the maintenance in force of the [disputed] legislation is necessary in a democratic society for these aims.”¹³⁹ The court found that there was no social need to justify “the risk of harm to vulnerable sections of society,” so the laws were not necessary.¹⁴⁰ “[T]he reasons given by the Government . . . are not sufficient to justify the maintenance in force of the impugned legislation in so far as it has the general effect of criminalising private homosexual relations between adult males capable of valid consent.” Hence the ECHR found a breach of Article 8.¹⁴¹

The United States Supreme Court used a privacy theory in its reasoning in *Lawrence v. Texas*.¹⁴² “Liberty protects the person from unwarranted government intrusions into a dwelling or other private places,” wrote Justice Anthony Kennedy.¹⁴³ He continued:

In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.

¹³⁸ *Id.* at ¶ 37. See European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4. Nov. 1950), E.T.S., as amended by Protocol No. 3, E.T.S. 45; Protocol No. 5, E.T.S. 55; Protocol No. 8 E.T.S. 118; and Protocol No. 11, E.T.S. 155; entered into forces 3 Sept. 1953 (Protocol No. 3 on 21 Sept. 1970, Protocol No. 5 on 20 Dec. 1971, Protocol No. 8 on 1 Jan. 1990, Protocol 11 on 11 Jan. 1998).

¹³⁹ Dudgeon, 7525/76 at ¶ 48 (internal quotation marks omitted).

¹⁴⁰ *Id.* at ¶ 60.

¹⁴¹ *Id.* at ¶ 63.

¹⁴² *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁴³ *Id.* at 562.

The instant case involves liberty of the person both in its spatial and more transcendent dimensions.¹⁴⁴

The reliance upon the right to privacy was explicit:

The [Griswold] Court described the protected interest as a right to privacy and placed emphasis on the marriage relation and the protected space of the marital bedroom. . . . After *Griswold* it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship.¹⁴⁵

This discussion of privacy led the Court to conclude that “adults may choose to enter upon [sexual] relationship[s] in the confines of their homes and their own private lives and still retain their dignity as free persons.”¹⁴⁶ The Court then stated, “When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.”¹⁴⁷

Courts have relied on the right to privacy to extend other protections to sexual minorities. In two cases, *Lustig-Praen v. United Kingdom*¹⁴⁸ and *Beckett v. United Kingdom*,¹⁴⁹ the ECHR considered Great Britain’s ban of homosexuals from the military and held that the ban violated the privacy provisions of Article 8 of the European Convention. Lustig-Praen and Beckett were homosexual members of the British armed forces. The Ministry of Defense had a policy that excluded homosexuals from military service, and during a police investigation of their sexuality, the men admitted their sexual orientation and were discharged because of their admissions.

The ECHR held that “the investigations by the military police into the applicants’ homosexuality, which included detailed interviews with each of them and with third parties on matters relating to their sexual orientation and practices . . . constituted a direct interference with the applicants’ right to respect for their private lives.”¹⁵⁰ In addition, it held that “[t]heir consequent administrative discharge on the sole ground of their sexual ori-

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 564-65.

¹⁴⁶ *Id.* at 567.

¹⁴⁷ *Id.*

¹⁴⁸ *Lustig-Praen v. United Kingdom*, App. no. 31417/96 (1999).

¹⁴⁹ *Beckett v. United Kingdom*, App. no. 32377/96 (1999).

¹⁵⁰ *Id.* at ¶ 64.

entation also constituted an interference with that right.”¹⁵¹ The Court expressly rejected the British government’s argument that “the presence of . . . homosexuals in the armed forces would have a substantial and negative effect on [the military’s] morale and . . . effectiveness”¹⁵² The Court stated: “To the extent that they represent a predisposed bias on the part of a heterosexual majority . . . these negative attitudes cannot, of themselves, be considered . . . to amount to sufficient justification for the interferences with the applicants’ rights . . . any more than [would] similar negative attitudes towards those of a different race, origin or colour.”¹⁵³

In *Goodwin v. United Kingdom*¹⁵⁴ and *I. v. United Kingdom*,¹⁵⁵ two transsexual women “claimed that the United Kingdom’s refusal to change their legal identities and papers to match their post-operative genders constituted discrimination.”¹⁵⁶ The ECHR held there had been violations of the applicants’ rights to respect for their private lives and to marry, creating violations of Articles 8 and 12 (right to marry) of the Convention.¹⁵⁷ The Court found that, “[T]here are no significant factors of public interest to weigh against the interest of this individual applicant in obtaining legal recognition of her gender re-assignment, . . . [and] [t]here has, accordingly, been a failure to respect her right to private life in breach of Article 8 of the Convention.”¹⁵⁸

Regarding the right to marry, the Court found that “it is artificial to assert that post-operative transsexuals have not been deprived of the right to marry as, according to law, they remain able to marry a person of their former opposite sex. The applicant in this case lives as a woman, is in a relationship with a man and would only wish to marry a man. She has no possibility of doing so. In the Court’s view, she may therefore claim that the very essence of her right to marry has been infringed.”¹⁵⁹

Finally, in *Van Kuck v. Germany*,¹⁶⁰ the ECHR decided a case in which a transsexual woman’s medical insurance company denied reim-

¹⁵¹ *Id.*

¹⁵² *Id.* at ¶ 88.

¹⁵³ *Id.* at ¶ 90.

¹⁵⁴ *Goodwin v. United Kingdom*, App. No. 28957/95 (2002).

¹⁵⁵ *I. v. United Kingdom*, App. No. 25680/94 (2002).

¹⁵⁶ Resource Library for International Jurisprudence on Sexual Orientation and Gender Identity, <http://www.hrw.org/legacy/english/docs/2007/07/11/global16374.htm> (last visited Feb. 20, 2009).

¹⁵⁷ *Id.*

¹⁵⁸ *I. v. United Kingdom*, App. No. 25680/94 at ¶ 73.

¹⁵⁹ *Goodwin*, App. No. 28957/95 at ¶ 101.

¹⁶⁰ *Van Kuck v. Germany*, App. No. 35968/97 (2003).

bursement for costs associated with sex-reassignment surgery. German courts upheld the insurance company's denial, but the ECHR held that the company's denials were violations of Articles 6 and 8 of the Convention, rights to a fair hearing and to private life. "[T]he very essence of the Convention," the Court stated, is "respect for human dignity and human freedom, [and hence] protection is given to the right of transsexuals to personal development and to physical and moral security."¹⁶¹ The German courts, the ECHR held, failed to respect "the applicant's freedom to define herself as a female person, one of the most basic essentials of self-determination."¹⁶²

Equal Treatment

The right of all people to equal treatment is fundamental. Equality concepts have become virtually inseparable from the construct of a free society since the ideal of equality emerged from an increased focus on ideas of natural law in the eighteenth century. Article 1 of the Declaration of the Rights of Man and of the Citizen begins, "Men are born and remain free and equal in rights."¹⁶³ The American Declaration of Independence and Constitution are other important documents of that era that included the fundamental precept of equal rights. In the years since, nations around the world have adopted constitutional provisions and statutes guaranteeing equal rights and equal protection to their citizens.

The IBHR embraces equality principles. The UDHR begins: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. . . ."¹⁶⁴ It also declares:

All human beings are born free and equal in dignity and rights. . . .¹⁶⁵

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹⁶⁶

¹⁶¹ *Id.* at 69.

¹⁶² *Id.* at ¶ 73.

¹⁶³ Originally "*Les hommes naissent et demeurent libres et égaux en droits.*" The Declaration of the Rights of Man and of the Citizen was approved by the French National Assembly on August 26, 1789.

¹⁶⁴ UDHR, *supra* note 29, pmbl.

¹⁶⁵ *Id.* at art. 1.

¹⁶⁶ *Id.* at art. 2.

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.¹⁶⁷

The UDHR makes several further references to equality, and both the ICCPR and ICESCR contain comparable passages.¹⁶⁸ The documents also strictly limit states' abilities to restrict the equal protection.¹⁶⁹

Since the right to equal treatment is so well established, a disconcerting question presents itself: how genuine, in reality, is *anyone's* right to equal treatment when it is not extended to *everyone*? A right to equal treatment either exists or not, and if it exists, it will apply to everyone; otherwise, it is oxymoronic and self-contradictory. It seems absurd that some states claiming to be committed to equal treatment nonetheless allow unequal treatment of sexual minorities. Such insincerity calls into question whether a state is too pusillanimous to enforce its ideals or is simply disingenuous in its human rights proclamations.

The development of protections for sexual minorities under equal treatment theories has largely come from case law, as citizens have challenged unjust situations and discriminatory statutes. Tribunals have been slow to respond, but progress has been made. Law professor James Wilets has identified three paradigms in which findings are made that equal rights are violated vis-à-vis sexual minorities: (1) "if a state makes certain acts between members of the same sex illegal while permitting the same acts between heterosexuals;" (2) "if a state discriminates against sexual minorities in its application of a law which is neutral on its face . . . ;" and (3) "if certain rights are granted . . . or withheld from individuals on the basis of their sexual orientation."¹⁷⁰

The first category, forbidding acts between same-sex partners that are permitted between opposite-sex partners, is patently unequal treatment that is difficult for states to justify if their laws have equal treatment guarantees. A recent example is *Lawrence v. Texas*,¹⁷¹ in which the United States Supreme Court considered a challenge to a Texas statute that criminalized

¹⁶⁷ *Id.* at art. 7.

¹⁶⁸ ICCPR, *supra* note 30, pmbl, art. 2 ¶¶ 1, 3, 26; ICESCR, *supra* note 31, pmbl, art. 2 ¶ 2.

¹⁶⁹ ICCPR *supra* note 30, art. 4 ¶ 2, art. 5; ICESCR, *supra* note 31, art. 4.

¹⁷⁰ James D. Wilets, *The Human Rights of Sexual Minorities: A Comparative and International Law Perspective*, 22 FALL HUM. RTS. 22, 24 (1995).

¹⁷¹ *Lawrence v. Texas*, 539 U.S. 558 (2003).

sodomy, but only when it involved same-sex partners.¹⁷² Sodomy was not a crime for opposite sex partners in Texas. The Court's majority struck down the law on due process grounds, but Justice Sandra Day O'Connor wrote a concurring opinion in which she found the statute unconstitutional on equal protection grounds.¹⁷³ She stated, "Texas' sodomy law brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else."¹⁷⁴ The state seemed to embrace this state of affairs, as O'Connor noted: "Texas itself has previously acknowledged . . . that the law 'legally sanctions discrimination against [homosexuals] in a variety of ways unrelated to the criminal law,' including in the areas of 'employment, family issues, and housing.'"¹⁷⁵

Texas attempted to justify the statute by using moral arguments, for example, claiming that the statute discriminated not against homosexual *persons*, but against homosexual *conduct*.¹⁷⁶ Justice O'Connor countered: "Texas' invocation of moral disapproval . . . proves nothing more than Texas' desire to criminalize homosexual sodomy."¹⁷⁷ She observed that moral disapproval was not sufficient justification for the statute, and that "legal classifications must not be drawn for the purpose of disadvantaging the group burdened by the law."¹⁷⁸ She convincingly dismissed the "conduct discrimination" claim, using a quotation from Justice Antonin Scalia's dissent in *Romer v. Evans*: "[T]here can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal."¹⁷⁹ Recognizing that a serious problem with such a discriminatory statute is the example it sets for the state's citizens, Justice O'Connor observed that the state's discrimination "in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."¹⁸⁰

¹⁷² Tex. Penal Code Ann. § 21.06(a) (Vernon 2007).

¹⁷³ *Lawrence*, 539 U.S. at 579-85 (O'Connor, J., concurring).

¹⁷⁴ *Id.* at 581.

¹⁷⁵ *Id.* at 581-82 (quoting *State v. Morales*, 826 S.W.2d 201, 203 (Tex. App. 1992)).

¹⁷⁶ *Id.* at 583.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996) (internal quotation marks omitted)).

¹⁷⁹ *Id.* (quoting *Romer*, 517 U.S. at 641 (Scalia, J., dissenting)) (quoting *Padula v. Webster*, 822 F.2d 97, 103 (1987)).

¹⁸⁰ *Id.* (quoting *Lawrence*, 539 U.S. at 575 (majority opinion) (internal quotation marks omitted)).

The second category involves a facially neutral law that is discriminatorily applied against sexual minorities. *Bowers v. Hardwick*,¹⁸¹ the decision the United States Supreme Court overruled in *Lawrence v. Texas*, provides an example of such a situation. In *Bowers*, Georgia challenged a decision of the Eleventh Circuit Court of Appeals holding that Georgia's anti-sodomy statute was unconstitutional.¹⁸² The Supreme Court reversed the Eleventh Circuit, but in his dissent, Justice Harry Blackmun disagreed with the Court's refusal to consider whether the statute violated federal equal protection guarantees.¹⁸³ Justice Blackmun noted, "Georgia's exclusive stress before this Court on its interest in prosecuting homosexual activity despite the gender-neutral terms of the statute may raise serious questions of discriminatory enforcement The legislature having decided that the sex of the participants is irrelevant to the legality of the acts, I do not see why the State can defend § 16-6-2 on the ground that individuals singled out for prosecution are of the same sex as their partners."¹⁸⁴

The third category of equal treatment violations concerns situations in which "certain rights are granted . . . or withheld from individuals on the basis of their sexual orientation."¹⁸⁵ This is the kind of discrimination the United Nations Human Rights Committee addressed in *Toonen v. Australia*.¹⁸⁶ Australian citizen Nicholas Toonen submitted a communication to the HRC in 1991, challenging portions of the Tasmanian Criminal Code (Sections 122(a) and (c), and 123), which "criminalize[d] various forms of sexual contacts between men, including all forms of sexual contacts between consenting adult homosexual men in private." No sexual contacts between "consenting homosexual women" were criminalized.¹⁸⁷ Toonen argued that the Tasmanian statutes violated articles 2, 17, and 26 of the ICCPR. Specifically, he argued that his right to privacy was violated, and that the statutes "distinguish[ed] between individuals in the exercise of their

¹⁸¹ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

¹⁸² See *Hardwick v. Bowers*, 760 F.2d 1202, 1204 n.1 (11th Cir. 1985). The challenged statute was O.C.G.A. § 16-6-2, which stated, in relevant part, "A person commits the offense of sodomy when he or she performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another."

¹⁸³ *Bowers*, 478 U.S. at 201 (Blackmun, J., dissenting).

¹⁸⁴ *Id.* at 203 n.2.

¹⁸⁵ Wilets, *supra* note 170, at 24.

¹⁸⁶ Human Rights Committee, *Toonen v. Australia* (Communication No. 488/1992, 31 March 1994).

¹⁸⁷ Human Rights Committee, *supra* note 186, at ¶ 3.1(c).

right to privacy on the basis of sexual activity, sexual orientation and sexual identity.”¹⁸⁸

Australia seemed to want the Tasmanian statutes overturned. The HRC stated:

The State party did not challenge the . . . communication on any grounds, [and] . . . notes that the laws challenged by Mr. Toonen are those of the state of Tasmania and only apply within the jurisdiction of that state. Laws similar to those challenged by the author once applied in other Australian jurisdictions but have since been repealed.¹⁸⁹

The HRC also noted that Australia “contends that there is now a general Australian acceptance that no individual should be disadvantaged on the basis of his or her sexual orientation.”¹⁹⁰ In addition, “[T]he State party acknowledges that a complete prohibition on sexual activity between men is unnecessary to sustain the moral fabric of Australian society.”¹⁹¹ Regarding the issue of equal protection, the HRC noted that “the State party acknowledges that if the Committee were to find the laws to be discriminatory, they would discriminate in the right to equal protection of the law.”¹⁹²

The Committee affirmed that “adult consensual sexual activity in private is covered by the concept of ‘privacy,’” and that the disputed statutes “‘interfere[d]’ with [Toonen’s] privacy.”¹⁹³ In a significant holding, the HRC also decided Australia’s question “whether sexual orientation may be considered an ‘other status’ for the purposes of article 26.”¹⁹⁴ The Committee found that “the reference to ‘sex’ in articles 2, paragraph 1, and 26 *is* to be taken as including sexual orientation.”¹⁹⁵

Unfortunately, because the Committee held that Toonen’s rights were violated under articles 17(1) and 2(1), it did “not consider it necessary to consider whether there has also been a violation of article 26.”¹⁹⁶ But HRC member Bertil Wennergren issued an individual opinion concerning the equal treatment issue, in which he stated that the disputed Tasmanian laws indeed violated “equality before the law” because they “ma[de] a dis-

¹⁸⁸ *Id.* at ¶ 3.1(b).

¹⁸⁹ *Id.* at ¶¶ 4.1-4.2.

¹⁹⁰ *Id.* at ¶ 6.7.

¹⁹¹ *Id.*

¹⁹² *Id.* at ¶ 6.14.

¹⁹³ *Id.* at ¶ 8.2.

¹⁹⁴ *Id.* at ¶ 8.7.

¹⁹⁵ *Id.* (emphasis added).

¹⁹⁶ *Id.* at ¶ 11.

inction between heterosexuals and homosexuals . . . [and] they criminalize[d] . . . sexual contacts between consenting men without at the same time criminalizing such contacts between women.”¹⁹⁷

A different paradigm implicating equal treatment rights was the subject of the American case *Romer v. Evans*, which involved a law designed to harm a particular group, sexual minorities.¹⁹⁸ After various Colorado municipalities passed ordinances banning discrimination based on sexual orientation, Colorado voters, in a 1992 referendum, adopted a state constitutional amendment that prohibited all legislative, executive, or judicial action designed to protect homosexual persons from discrimination based on their “homosexual, lesbian, or bisexual orientation, conduct, practices or relationships.”¹⁹⁹ A Colorado state court granted a permanent injunction enjoining enforcement of the amendment, which the Colorado Supreme Court affirmed.

In its decision, SCOTUS held that the amendment violated the Equal Protection Clause of the United States Constitution. “We must conclude that [the amendment] classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws.”²⁰⁰

Justice Anthony M. Kennedy, writing for the Court’s majority, opened the opinion by quoting the first Justice John Harlan: “[T]he Constitution neither knows nor tolerates classes among citizens.”²⁰¹ Justice Kennedy stated that “those words now are understood to state a commitment to the law’s neutrality where the rights of persons are at stake.”²⁰² He explained the fundamental standard by which the Court analyzes such laws:

“[Because] most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. . . . [w]e have attempted to reconcile the [equality] principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we

¹⁹⁷ *Id.* at Appendix (Individual opinion by Mr. Bertil Wennergren).

¹⁹⁸ *Romer v. Evans*, 517 U.S. 620 (1996).

¹⁹⁹ *Id.* at 624 (internal quotation marks omitted) (quoting Colo. Const., art. II § 30b).

²⁰⁰ *Id.* at 635-36.

²⁰¹ *Id.* at 623 (internal quotation marks omitted) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

²⁰² *Id.*

will uphold the legislative classification so long as it bears a rational relation to some legitimate end.”²⁰³

The Colorado amendment, Justice Kennedy observed, “fails, indeed defies, even this conventional inquiry.”²⁰⁴ The amendment “is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence.”²⁰⁵

Colorado attempted to defend the amendment by arguing that it was not discriminatory but merely “den[ied] homosexuals special rights,” and “put[] gays and lesbians in the same position as all other persons.”²⁰⁶ Justice Kennedy rejected this argument, stating delicately, “This reading of the amendment’s language is implausible.”²⁰⁷

The Court seemed appalled by the amendment’s unabashed hatefulness, remarking,

“It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution’s guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.”²⁰⁸

Furthermore, “in making a general announcement that gays and lesbians shall not have any particular protections from the law, [the amendment] inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it.”²⁰⁹ Finally, “If the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”²¹⁰

²⁰³ *Id.* at 631.

²⁰⁴ *Id.* at 632.

²⁰⁵ *Id.* at 633.

²⁰⁶ *Id.* at 626.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 633.

²⁰⁹ *Id.* at 635.

²¹⁰ *Id.* at 634 (emphasis added) (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)).

Another interesting case implicating equal treatment rights is *Karner v. Austria*.²¹¹ After the Austrian Supreme Court denied a homosexual man the right to continue living in his deceased partner's apartment, he appealed to the ECHR. The Austrian Court had held that "'life companion' (Lebensgefährte) in section 14(3) of the Rent Act was to be interpreted as at the time it was enacted, and the legislature's intention in 1974 was not to include persons of the same sex."²¹² The ECHR held that this interpretation violated the nondiscrimination protections of Article 14 of the Convention.²¹³ "Just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification," the Court stated.²¹⁴

Liberty

Liberty may be variously defined as "the quality or state of being free . . . the power to do as one pleases . . . freedom from arbitrary or despotic control . . . the positive enjoyment of various social, political, or economic rights and privileges . . . the power of choice."²¹⁵ *Black's Law Dictionary* defines "liberty" as "[f]reedom from arbitrary or undue external restraint, esp[ecially] by a government."²¹⁶ Liberty's place as an international norm is reflected in the UDHR, "Everyone has the right to life, liberty and security of person."²¹⁷ It is also guaranteed in the ICCPR, "Everyone has the right to liberty and security of person. . . . No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."²¹⁸ In the United States, the security of liberty was a basic reason for adopting the Constitution, as stated in the Preamble, and liberty is further guaranteed in the Fifth and Fourteenth Amendments.

Liberty grants the fundamental human right to choose whether, how, and when to be intimate with another person. "When sexuality finds overt expression in intimate conduct with another person, the conduct can

²¹¹ *Karner v. Austria*, App. No. 40016/98 (2003).

²¹² *Id.* at ¶ 15.

²¹³ *Id.* at ¶ 43. See The European Convention on Human Rights and its Five Protocols, *supra* note 138, art. 14 states, "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground"

²¹⁴ *Id.* at ¶ 37.

²¹⁵ MERRIAM-WEBSTER, *supra* note 41, at 716.

²¹⁶ BLACK'S LAW DICTIONARY 937 (8th ed. 2004).

²¹⁷ UDHR, *supra* note 29, art. 3.

²¹⁸ ICCPR, *supra* note 30, art. 9.

be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.”²¹⁹

Liberty cannot be unconstrained, however. So that maximal liberty may exist for everyone, no one is able to enjoy absolute liberty. Eric Heinze defines conditions of liberty: “the liberty to exercise one’s rights only to the degree that the rights of others (third parties) are not harmed,” and “the concomitant liberty to exercise one’s rights without the burden of illegitimate claims of harm on the part of third parties.”²²⁰ These constraints have been the source of considerable legal argument, and in relation to sexual minorities the arguments have tended to focus on morality concerns. The question usually is whether, or to what extent, a state may legislate morality.²²¹ Heinze poses the question more specifically as, “[W]hether a moral sentiment alone provides an adequate basis for curtailing rights.”²²²

Justice John Paul Stevens’s dissenting opinion in *Bowers v. Hardwick* provides a strong answer to this question:

[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of “liberty” protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.²²³

Liberty interests were important in *Goodridge v. Department of Public Health*,²²⁴ the historic case in which the Massachusetts Supreme Judicial Court held that the state could not “deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex

²¹⁹ *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

²²⁰ HEINZE, *supra* note 51, at 187.

²²¹ *Id.* at 191.

²²² *Id.* at 191.

²²³ *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting) (citations omitted).

²²⁴ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

who wish to marry.”²²⁵ Chief Justice Margaret H. Marshall wrote for the Court’s majority:

“[In *Lawrence*, the United States Supreme Court] affirmed that the core concept of common human dignity protected by the Fourteenth Amendment to the United States Constitution precludes government intrusion into the deeply personal realms of consensual adult expressions of intimacy and one’s choice of an intimate partner. The Court also re-affirmed the central role that decisions whether to marry or have children bear in shaping one’s identity.”²²⁶

Justice Marshall stated that “[t]he Massachusetts Constitution is, if anything, more protective of individual liberty and equality than the Federal Constitution; it may demand broader protection for fundamental rights; and it is less tolerant of government intrusion into the protected spheres of private life.”²²⁷ The decision spoke of marriage’s benefits to all the community, including that “[c]ivil marriage anchors an ordered society by encouraging stable relationships over transient ones.”²²⁸ Marriage, the decision expounds, is “at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family.”²²⁹

Justice Marshall acknowledged that “[t]he benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death. The department states that ‘hundreds of statutes’ are related to marriage and to marital benefits.”²³⁰ She also observed, “Without the right to marry—or more properly, the right to choose to marry—one is excluded from the full range of human experience and denied full protection of the laws for one’s ‘avowed commitment to an intimate and lasting human relationship.’”²³¹ The Court’s decision concluded: “We declare that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution.”²³²

²²⁵ *Id.* at 948.

²²⁶ *Id.* at 948-49.

²²⁷ *Id.*

²²⁸ *Id.* at 954.

²²⁹ *Id.*

²³⁰ *Id.* at 955.

²³¹ *Id.* at 326 (quoting *Baker v. State*, 170 Vt. 194, 229 (Vt. 1999)).

²³² *Id.* at 969.

Sexual Orientation as a Fundamental Human Right

While many people might agree that sexual minorities are entitled to the same rights as everyone else, and that existing rights could be expanded to include the right to have sexual relationships with other consenting adults, another question still looms: whether the right to one's sexual identity is fundamental. Many people would perceive this simply as a right to live life as a person feels she must, and answer the question positively. But others might answer negatively, arguing that being a sexual minority is not a valid life choice. This kind of thinking leads to circuitous debates about nature-versus-nurture, religion, and morality. Put simply, many people believe that the right to be one's self, sexually, is the right to be an authentic person, a complete human being.

Science cannot yet tell us what determines a person's gender identity or sexual orientation, or whether sexual identity is innate or acquired. Obsessing about this conundrum is futile and misses the essential point: fundamental human rights exist for everyone regardless of any other consideration. Because sexual minorities are people, they are entitled to fundamental human rights. Furthermore, regardless of whether a non-heterosexual or atypical identity is innate or acquired, sexual identity is one of a human being's most personal and essential characteristics. Therefore, as long as a person's identity manifests as individual behavior or consensual behavior between adults—just as heterosexual behavior must—this most personal and essential characteristic should be protected as a fundamental right. After all, if sexual identity is innate, it is something about which a person has no choice. And if it is acquired, it is part of a person's thoughts and is reflected in his opinions and expressions, and should not be subject to regulation. Articles 18 and 19 of the UDHR guarantee freedom of thought, opinion, and expression.²³³

The United States Supreme Court missed this point in 1986, when it characterized the issue in *Bowers v. Hardwick*: “[R]espondent would have us announce . . . a fundamental right to engage in homosexual sodomy.”²³⁴ Justice Harry Blackmun understood better, demonstrated by his dissent: “This case is no more about ‘a fundamental right to engage in homosexual sodomy’ . . . than *Stanley v. Georgia* was about a fundamental right to watch obscene movies Rather, this case is about the most comprehen-

²³³ UDHR, *supra* note 29, art. 18: “Everyone has the right to freedom of thought, conscience and religion”; art. 19: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference”

²³⁴ *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986).

sive of rights and the right most valued by civilized men, namely, the right to be let alone.”²³⁵ When the Court overruled *Bowers* seventeen years later, Justice Anthony Kennedy wrote, “Freedom extends beyond spatial bounds . . . [and] presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”²³⁶ Freedom is a constant theme throughout human rights documents. The freedom to be one’s self in both innate and acquired ways is certainly a fundamental cornerstone of human rights.

V. EXISTING LAWS AND SEXUAL MINORITIES

Despite slow signs of progress, the expansion of existing rights does not appear to be a satisfactory solution for sexual minorities’ rights. As Canadian law professor Douglas Sanders observes, “A general approach to discrimination has not been characteristic of international human rights law. . . . Only through invoking provisions on personal privacy and certain general provisions on equality have lesbians and gay men been able to gain some recognition.”²³⁷

The rights in question cover a broad spectrum. Discrimination often manifests as the deprivation of one or more of these rights: equality in and before the law; equality of age of consent for same-sex relationships; freedom from violence and harassment; right to life; freedom from torture or cruel, inhuman, or degrading treatment; protection from arbitrary arrest; freedom of movement; right to a fair trial; right to privacy; rights to freedom of expression and association; free practice of religion; right to work and equality of employment opportunities; rights to social security, assistance, and benefits; right to physical and mental health and health care; right to form a family; protection for children against separation from parents; and the right to education or to equality of opportunities in education.²³⁸

²³⁵ *Id.* at 199 (Blackmun, J., dissenting) (citations and punctuation marks omitted) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). *Stanley v. Georgia*, 394 U.S. 557 (1969) (holding that a state had no interest in mere possession of obscenity in one’s own home, and that a statute forbidding such possession was invalid because it violated the first and fourteenth amendments in that it was an attempt to control a person’s private thoughts).

²³⁶ *Lawrence v. Texas*, 539 U.S. 558 (2003).

²³⁷ Douglas Sanders, *Human Rights and Sexual Orientation in International Law*, International Lesbian, Gay, Bisexual, Trans and Intersex Association, July 17, 2005, para. 1, http://www.ai-lgbt.org/resources_other.htm.

²³⁸ HREA.org, *Sexual Orientation and Human Rights*, http://www.hrea.org/index.php?base_id=161 (last visited Feb. 23, 2009).

Given the breadth and weight of this partial list, it is incomprehensible why so many governments fail to do more to guarantee these rights. All are basic, fundamental rights—rights that no one would want taken away. To ensure that they are available to all members of society does not constitute giving a particular group “special rights,” which is a favorite argument of those who oppose the end of discrimination against sexual minorities.²³⁹ Ensuring that the rights are available to everyone, regardless of sexual orientation, is simply ensuring that everyone has the same rights and opportunities.

The enactment and enforcement of laws explicitly forbidding discrimination based on sexual identity is an important step to eradicating homophobia. Some people may question why, and may believe that the key to real progress is not passing laws but changing hearts and minds. Martin Luther King, Jr., wrote: “It may be true that the law cannot make a man love me, but it can keep him from lynching me, and I think that’s pretty important.”²⁴⁰ Sadly, the law did not protect Dr. King in the end, but his words were about protecting an entire group from societal discrimination. In the United States, it took the adoption of laws forbidding discrimination and hate crimes against African-Americans, and expressly guaranteeing equal treatment in various areas of life, before any consistent progress was made toward eliminating racial discrimination. In South Africa, a new government was necessary to begin ridding that country of horrendous racial discrimination. Whether those affected were women, Aboriginal peoples, racial minorities, religious minorities, or sexual minorities, proactive and affirmative legislation has repeatedly proven to be the successful way to begin a corrective process. Laws express the expectations and aspirations of society. Firm laws protecting sexual minorities from discrimination and guaranteeing equal treatment would make it more difficult for those opposed to such equality to justify their actions, and it would set an expectation for the way civilized members of society should behave.

For sexual minorities, discrimination is the heart of the problem that must be addressed to enable consistent advancement toward equality. Martin Luther King’s words are again apropos, this time in paraphrase: Discrimination is a hellhound gnawing at sexual minorities in every waking moment of their lives to remind them that the lie of their inferiority is ac-

²³⁹ See generally, e.g., *Romer v. Evans*, 517 U.S. 620 (1996).

²⁴⁰ Martin Luther King, Jr., Address at Western Michigan University (December 18, 1963), available at <http://www.wmich.edu/library/archives/mlk/transcription.html>.

cepted as truth in the society dominating them.²⁴¹ When sexual minorities are accorded their rights as human beings, and when they are allowed to live with dignity and security, everyone will benefit. The transgender people and non-heterosexuals will live fuller, more authentic lives, and will be able to focus on contributing positively to the world around them. And without the need to expend so much energy to maintain separation from sexual minorities, the rest of the world will be able to focus better on solving problems and increasing the quality of life for everyone.

NATIONAL CONSTITUTIONS

Explicit nondiscrimination protection for sexual minorities in national constitutions is a rarity. South Africa became the first nation to provide such protection with the adoption of its new constitution in 1996. Section 9 declares:

(3) *The state* may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, *sexual orientation*, age, disability, religion, conscience, belief, culture, language, and birth.

(4) *No person* may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is *unfair unless it is established that the discrimination is fair*.²⁴²

It is exciting not only that sexual orientation is included among the impressive list of protected categories in subsection 3, but also that the Constitution offers such protection from the state as well as individual persons (subsections 3 and 4). The South African Constitutional Court website explains, "Just as [the Constitution] specifically mentions race and ethnicity in response to South Africa's past, sexual orientation is included because of

²⁴¹ See Martin Luther King, Jr., Keynote Address at the Southern Christian Leadership Conference: Where Do We Go From Here: Chaos or Community? (Aug. 16, 1967) (noting "[d]iscrimination is a hellhound that gnaws at Negroes in every waking moment of their lives to remind them that the lie of their inferiority is accepted as truth in the society dominating them.").

²⁴² Constitution of the Republic of South Africa, Act 108 of 1996 § 9 (emphasis added), available at <http://www.concourt.gov.za/text/constitution/text/index.html>.

the injustices gay and lesbian people have suffered.”²⁴³ After South Africa, the next two nations to modify their constitutions to include nondiscrimination protection for sexual minorities were Fiji (1997) and Ecuador (1998).²⁴⁴

Europe currently leads the world in providing constitutional protections for sexual minorities. Constitutional protection for sexual orientation has existed in Switzerland since 2000²⁴⁵ Sweden has constitutional protection for sexual orientation,²⁴⁶ as well as antidiscrimination statutes;²⁴⁷ in addition, gay partnerships have the same rights as heterosexual marriage, including adoption.²⁴⁸ Portugal instituted constitutional protection for sexual orientation in 2004.²⁴⁹ Article 24 of Kosovo’s new 2008 constitution includes protection for sexual orientation.²⁵⁰ Sexual orientation is also protected in the constitutions of Canada and parts of Brazil.²⁵¹

STATUTES AND JUDICIAL DECISIONS

According to the International Lesbian and Gay Association, fifty nations had laws prohibiting discrimination based on sexual orientation in May 2008.²⁵² Hate crime laws, although common throughout the world,

²⁴³ Constitutional Court of South Africa, *Gay and Lesbian Rights*, <http://www.concourt.gov.za/text/rights/know/homosexual.html> (last visited Feb. 23, 2009).

²⁴⁴ Holning Lau, *Sexual Orientation: Testing the Universality of International Human Rights Law*, 71 U. CHI. L. REV. 1689, 1703 (2004).

²⁴⁵ OTTOSSON, *supra* note 105, at 47.

²⁴⁶ *Id.*

²⁴⁷ *Id.* See also KEES WAALDIJK & MATTEO BONINI-BARALDI, SEXUAL ORIENTATION DISCRIMINATION IN THE EUROPEAN UNION: NATIONAL LAWS & THE EMPLOYMENT EQUALITY DIRECTIVE 69 (2006); Sexual Orientation Discrimination (Employment) Act (1999:133), available at <http://www.sweden.gov.se/sb/d/574/a/104989>.

²⁴⁸ 3 ch. 4 § Registration of Partnership Act (1994:1117), available at <http://www.homo.se/o.o.i.s/1630>. See also Ministry of Justice, Sweden, *Fact Sheet: Homosexual Partnership & Adoption* (2003), available at <http://www.sweden.gov.se/sb/d/2768/a/16217>.

²⁴⁹ OTTOSSON, *supra* note 105, at 47. See also International Lesbian, Gay, Bisexual, Trans and Intersex Association, *Portugal’s constitution bans discrimination based on sexual orientation*, http://www.ilga.org/news_results.asp?LanguageID=1&FileCategory=1&FileID=289 (last visited Feb. 9, 2009).

²⁵⁰ KOSOVO CONST. 2008 art. 28, available at <http://www.kosovoconstitution.info/?cid=2,300>.

²⁵¹ OTTOSSON, *supra* note 105, at 47.

²⁵² See International Lesbian, Gay, Bisexual, Trans and Intersex Association, http://www.ilga.org/map/LGBTI_rights.jpg (last visited Feb. 9, 2009).

seem notoriously difficult to track. The Human Rights First *Hate Crime Report Card* (2007)²⁵³ notes that, “Most countries that publish hate crime data report on the incidence of ‘racist’ crime, yet other types of violent bias crimes that are not racist, or in which racism is only one element—such as violence motivated by religious intolerance, sexual orientation, and disability—are more rarely reported in official statistics.”²⁵⁴ According to the report, more than thirty of the reporting countries have “legislation [that] treats bias-motivated violent crime as a separate crime or in which bias is regarded as an aggravating circumstance that can result in enhanced penalties.”²⁵⁵ Only eleven of the thirty have sexual orientation as one of the bias types covered by a provision on aggravating circumstances.²⁵⁶ Twenty-three of the countries “still have no express provisions defining bias as an aggravating circumstance in the commission of a range of violent crimes against persons.”²⁵⁷ Surprisingly, many of these nations are nations that have non-discrimination laws.

The Human Rights First *2008 Hate Crime Survey*²⁵⁸ reports that hate crimes “based on sexual orientation and gender identity . . . [are] an intimidating day-to-day reality for people across Europe and North America.”²⁵⁹ Such crimes constitute “a significant portion of violent hate crimes overall and are characterized by levels of serious physical violence that in some cases exceed those present in other types of hate crimes.”²⁶⁰ Sadly, “[n]one of the official reports suggest that incidents are decreasing; government data in some countries, as well as credible nongovernmental reports, suggest an increase.”²⁶¹

²⁵³ *Overview: Hate Crime Report Card*, HUMAN RIGHTS FIRST (Human Rights First, Washington, D.C.), 2007, available at <http://www.humanrightsfirst.org/discrimination/pages.aspx?id=78>.

²⁵⁴ *Id.* at iv.

²⁵⁵ *Id.*

²⁵⁶ *Id.* at vii. The 11 nations are Andorra, Belgium, Canada, Croatia, Denmark, France, Romania, Spain, Sweden, United Kingdom, United States.

²⁵⁷ *Id.* at iv. The 23 nations are Albania, Bosnia-Herzegovina, Bulgaria, Cyprus, Estonia, Germany, Greece, Holy See, Hungary, Iceland, Ireland, Luxembourg, Lithuania, Macedonia, Monaco, Montenegro, the Netherlands, Poland, San Marino, Serbia, Slovenia, Switzerland, and Turkey.

²⁵⁸ *2008 Hate Crime Survey*, HUMAN RIGHTS FIRST, (Human Rights First, Washington, D.C.), 2008, available at <http://www.humanrightsfirst.org/discrimination/pages.aspx?id=78>.

²⁵⁹ *Id.* at 127.

²⁶⁰ *Id.*

²⁶¹ *Id.*

Outside the United States

Currently, six nations have same-sex marriage: Belgium, Canada, Netherlands, Norway, South Africa, and Spain.²⁶² Four additional nations recognize same-sex marriages performed elsewhere, but do not perform them: Aruba, France, Israel, and Netherlands Antilles.²⁶³ Sixteen nations have civil unions or domestic partnerships that confer the rights and benefits of marriage but call it something else.²⁶⁴ In addition, Argentina, Australia, Brazil, and Mexico recognize civil unions or domestic partnerships in some regions.²⁶⁵

Numerous countries have voluntarily decriminalized homosexuality or enacted statutory protections that prohibit discrimination against sexual minorities. Some examples follow.

In a 1992 referendum, seventy-three percent of Swiss voters accepted the reform of Swiss Federal legislation on sexual offenses, including the elimination of "all discrimination against homosexuality from the Penal Code."²⁶⁶ Israel is the only Asian nation to provide genuine legal protections for sexual minorities, with its 1992 legislation that prohibited employment discrimination based on sexual orientation.²⁶⁷ Homosexuals have been allowed to serve openly in the military since 1993.²⁶⁸ In 2005, the Israeli Supreme Court held that a lesbian couple could legally adopt one another's children.²⁶⁹

²⁶² Kevin Bourassa & Joe Varnell, *Norway's Expansion of Human Rights: Six Countries Now Support Equal Marriage*, EQUAL MARRIAGE FOR SAME SEX COUPLES, June 17, 2008, available at <http://www.samesexmarriage.ca/equality/nor170608.htm>.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ Alan Reekie, *European International Control*, in SOCIOLEGAL CONTROL OF HOMOSEXUALITY: A MULTI-NATION COMPARISON 179, 189 (Donald J. West & Richard Green eds., 1997).

²⁶⁷ Alon Harel, *Overview & Commentary: Bagaz 721/94 El-Al v. Danilowitz and the Future of Sexual Minority Rights in Israel*, 1 NAT'L. J. SEX. ORIENT. L. 302, 303 (1995), available at <http://www.ibiblio.org/gaylaw/issue2/harel.html>.

²⁶⁸ Itamar Eichner, *Follow Israel's Example on Gays in the Military*, US Study Says, YNETNEWS, Feb. 8, 2007, available at <http://www.ynetnews.com/articles/0,7340,L-3362505,00.html>.

²⁶⁹ Yaros-Hakak v. Attorney General, C.A. 10280/01 (2005).

The Czech Republic legalized most consensual homosexual activity in 1961.²⁷⁰ The age of consent for homosexual and heterosexual activities were equalized in 1990, and homosexual prostitution was decriminalized the same year.²⁷¹ Homosexuals are allowed to serve openly in the Czech military.²⁷² The 2001 Labor Code prohibits sexual orientation discrimination,²⁷³ and civil unions for same-sex couples were legalized in 2006.²⁷⁴ Denmark legalized homosexuality in 1933²⁷⁵ and became the first nation to legalize same-sex unions in 1989.²⁷⁶ Homosexuals have served openly in the military since 1978,²⁷⁷ anti-discrimination laws cover sexual orientation,²⁷⁸ gay adoption is allowed,²⁷⁹ and hate crime legislation includes crimes based on sexual orientation.²⁸⁰ Finland decriminalized homosexual acts in 1971, legalized same-sex unions in 2002, outlawed discrimination based on sexual orientation in 1995, anti-discrimination laws cover sexual orientation, and allow homosexuals to serve openly in the military.²⁸¹

France decriminalized homosexuality in 1789 and enacted antidiscrimination legislation in 1985.²⁸² Homosexuals may serve in the French

²⁷⁰ Ivo Procházka, *The Czech & Slovak Republics*, in SOCIOLEGAL CONTROL OF HOMOSEXUALITY: A MULTI-NATION COMPARISON 243, 246 (Donald J. West & Richard Green, eds., 1997).

²⁷¹ *Id.*

²⁷² *New Data Analysis Finds American Policy Out of Step with Other Democratic Nations*, PALM CENTER: BLUEPRINTS FOR SOUND POLICY, Mar. 17, 2003, http://www.palmcenter.org/press/dadt/releases/russia_joins_u_s_turkey_in_barring_gays_from_military_service.

²⁷³ WAALDIJK & BONINI-BARALDI, *supra* note 247, at 150.

²⁷⁴ *Timeline: Legal progress for same-sex couples*, REUTERS UK, Nov. 12, 2008, available at <http://uk.reuters.com/article/burningIssues/idUKTRE4AB6C020081112?pageNumber=1&virtualBrandChannel=0>. The Czech House of Representatives passed the civil union bill on December 16, 2005, and the Senate passed it on January 26, 2006. The President vetoed the bill, but on March 15, 2006, the House of Representatives overturned the President's veto.

²⁷⁵ OTTOSSON, *supra* note 105, at 45.

²⁷⁶ Reekie, *supra* note 266, at 190.

²⁷⁷ DANIEL OTTOSSON, LGBT WORLD LEGAL WRAP UP 8 (2006), available at <http://www.ilga-europe.org/Europe/Issues/International/LGBT-world-legal-wrap-up-survey-November-2006>.

²⁷⁸ Reekie, *supra* note 266, at 189-90. See also *Id.* at 6-7.

²⁷⁹ OTTOSSON, *supra* note 277, at 5.

²⁸⁰ *Id.* at 7.

²⁸¹ *Id.* at 3, 5-8.

²⁸² *Id.* at 3, 6-7.

military and hate crime laws apply to sexual orientation-based crimes.²⁸³ Civil Solidarity Pacts (domestic partnerships) were enacted for all couples, of whatever sexual orientation, in 1999, and discrimination based on sexual orientation is against the law.²⁸⁴ Hungary legalized homosexual conduct in 1962.²⁸⁵ The Hungarian Constitutional Court ruled in 1999 that the constitutional ban on discrimination covers sexual orientation.²⁸⁶ This antidiscrimination law was added to Hungarian statutes in 2004.²⁸⁷ Iceland repealed anti-homosexuality laws in 1940, and instituted same-sex civil unions in 1996.²⁸⁸ Same-sex couples have been allowed to adopt children since 2006.²⁸⁹ Iceland has statutes against discrimination based on sexual orientation, and hate crime laws cover crimes based on sexual orientation.²⁹⁰

Two of the most liberal nations regarding rights of sexual minorities are the Netherlands and the United Kingdom. Sexual minorities in the Netherlands enjoy a full spectrum of rights and protections. The Netherlands decriminalized homosexuality in 1811²⁹¹ with the General Equal Treatment Act of 1994 that included sexual orientation as a protected category.²⁹² In 2001, the Netherlands became the first country in the world to recognize same-sex marriage.²⁹³ In the United Kingdom, the 2004 Civil Partnership Act created a parallel legal structure to marriage under which homosexual couples have all the rights and responsibilities of marriage.²⁹⁴

²⁸³ *Id.* at 7-8.

²⁸⁴ *Id.* at 5-7.

²⁸⁵ OTTOSSON, *supra* note 105, at 45.

²⁸⁶ Lilla Farkas, *Nice on Paper: The Aborted Liberalisation of Gay Rights in Hungary*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 563, 563 n.2 (Mads Andenas & Robert Wintemute eds., 2001). *See generally* 20/1999 (VI.25.) AB *határozat*, available at <http://www.mkab.hu/en/enpage3.htm>.

²⁸⁷ OTTOSSON, *supra* note 277, at 6-7.

²⁸⁸ *Id.* at 3, 5.

²⁸⁹ *Id.* at 5.

²⁹⁰ *Id.* at 7.

²⁹¹ OTTOSSON, *supra* note 105, at 45.

²⁹² Kees Waaldijk, *Others May Follow: The Introduction of Marriage, Quasi-Marriage, and Semi-Marriage for Same-Sex Couples in European Countries*, 38 NEW ENG. L. REV. 569, 578 (2004).

²⁹³ *Id.* at 572.

²⁹⁴ *See* Directgov, *Marriage, Cohabitation and Civil Partnerships*, http://www.direct.gov.uk/en/Governmentcitizensandrights/Yourrightsandresponsibilities/DG_10026937 (last visited Jan. 26, 2009). For the text of the Act, refer to Civil Partner-

The Gender Recognition Act of 2004 legalized a process for transgender people to change their gender and have their acquired gender legally recognized.²⁹⁵ The United Kingdom legally protects sexual minorities in virtually every way imaginable.

New Zealand decriminalized homosexuality in 1986,²⁹⁶ and the 1993 Human Rights Act prohibits discrimination on grounds of sexual orientation.²⁹⁷ The Civil Union Act of 2004 established civil unions for same-sex and opposite-sex couples.²⁹⁸ In addition, the New Zealand High Court ruled in 1994 that post-operative transsexuals could marry as their new sex.²⁹⁹

Decriminalization of homosexual conduct has often been accomplished by court decisions. For example, in *National Coalition for Gay and Lesbian Equality v. Minister of Justice*,³⁰⁰ the Constitutional Court of South Africa unanimously overturned laws criminalizing homosexual conduct. The Court held that such laws violated privacy protections as well as principles of equality and dignity. "In eloquent language, both the majority opinion and a concurrent opinion affirmed that respecting gay and lesbian equality and dignity was a key aspect of overcoming South Africa's repressive past."³⁰¹

The National Coalition for Gay and Lesbian Equality and the South African Human Rights Commission sought an order declaring two common

ship Act 2004 (Eng.), available at http://www.opsi.gov.uk/acts/acts2004/ukpga_20040033_en_1.

²⁹⁵ See Department for Constitutional Affairs, *Legislation: The Gender Recognition Act 2004*, <http://www.dca.gov.uk/constitution/transsex/legs.htm>. For the text of the Act (last visited Jan. 26, 2009). For the text of the Act, refer to Gender Recognition Act 2004 (Eng.), available at http://www.opsi.gov.uk/acts/acts2004/ukpga_20040007_en_1.

²⁹⁶ OTTOSSON, *supra* note 105, at 45.

²⁹⁷ *Changes to the Human Rights Act 1993: Guidelines for the Health and Disability Sector*, Ministry of Health 8 (2002), [http://www.moh.govt.nz/moh.nsf/82f4780aa066f8d7cc2570bb006b5d4d/3a40e840a185a151cc256bfa0073bcd/\\$FILE/human-rights-act.pdf](http://www.moh.govt.nz/moh.nsf/82f4780aa066f8d7cc2570bb006b5d4d/3a40e840a185a151cc256bfa0073bcd/$FILE/human-rights-act.pdf).

²⁹⁸ *Civil Union*, The Department of Internal Affairs, http://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Services-Births-Deaths-and-Marriages-Civil-Union?OpenDocument (last visited Jan. 26, 2009).

²⁹⁹ *New Zealand Attorney General v. Family Court at Otahuhu*, [1991], CP787/91 (H.C.), available at <http://www.pfc.org.uk/node/371>.

³⁰⁰ *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, 1998 (12) BCLR 1517 (CC) [hereinafter *National Coalition I*].

³⁰¹ Resource Library for International Jurisprudence on Sexual Orientation and Gender Identity, *supra* note 156.

law sodomy offenses and certain statutory provisions that criminalized sexual acts between males to be unconstitutional. The Court noted that in traditional South African law, certain sexual acts between males constituted illegal sodomy, consent notwithstanding, but the same acts were legal when the participants were a consenting male and female.³⁰² The Court concluded that this constituted discrimination because of sexual orientation,³⁰³ and stated that this discrimination “reinforce[d] already existing societal prejudices and severely increase[d] the negative effects of such prejudices on their lives.”³⁰⁴ In addition, “[t]he impact of discrimination on gays and lesbians is rendered more serious and their vulnerability increased by the fact that they are a political minority not able on their own to use political power to secure favourable legislation for themselves.”³⁰⁵

Referring to the fact that gay men were particularly singled out in the sodomy laws, the Court observed, “[g]ay men are a permanent minority in society and have suffered in the past from patterns of disadvantage. The impact is severe, affecting the dignity, personhood and identity of gay men at a deep level. It occurs at many levels and in many ways and is often difficult to eradicate.”³⁰⁶ The Court appeared to have trouble understanding the supposed justification for the law: “It has no other purpose than to criminalise conduct which fails to conform with the moral or religious views of a section of society. . . . [Such] discrimination has . . . gravely affected the rights and interests of gay men and deeply impaired their fundamental dignity.”³⁰⁷ Ultimately, it held that the discriminatory laws breached sections 9 and 10 of the 1996 Constitution.³⁰⁸

In South America, the Brazilian states of Alagoas, Distrito Federal, Mato Grosso, Pará, Santa Catarina and Sergipe explicitly prohibit discrimination based on sexual orientation in their constitutions.³⁰⁹ Brazil decriminalized homosexual conduct in 1831.³¹⁰ Uruguay decriminalized homosexuality in 1934³¹¹ and a 2004 nondiscrimination law included sexual orientation as a protected category;³¹² hate crime laws have applied to

³⁰² National Coalition I, *supra* note 300, at ¶ 14.

³⁰³ *Id.* at ¶ 18.

³⁰⁴ *Id.* at ¶ 23.

³⁰⁵ *Id.* at ¶ 25.

³⁰⁶ *Id.* at ¶ 26(a).

³⁰⁷ *Id.* at ¶ 26(b)-(c).

³⁰⁸ *Id.* at ¶¶ 27-28.

³⁰⁹ OTTOSSON, *supra* note 105, at 47.

³¹⁰ *Id.* at 45.

³¹¹ *Id.*

³¹² *Id.* The law is Ley N° 17.817.

crimes based on sexual orientation since 2003.³¹³ Impressively, Uruguay was the first Latin American country to legalize same-sex unions, which have been available since January 1, 2008.³¹⁴

Costa Rica has some of the most liberal protections in Central America. Discrimination based on sexual orientation has been prohibited there since 1998.³¹⁵ On March 27, 2008, Costa Rican President Oscar Arias Sanchez signed an executive order designating May 17 as the National Day Against Homophobia.³¹⁶

Mexico officially decriminalized homosexuality in 1872, when the French occupied Mexico and imposed the Napoleonic Code, which “drew no distinction between homosexual and heterosexual acts.”³¹⁷ But this does not mean Mexico has been a friendly place for sexual minorities. Public immorality laws were used against sexual minorities until the 1998 penal code removed such laws.³¹⁸ Even today, “[I]t is still a hotbed for ‘hate crimes’—especially against homosexuals.”³¹⁹ Progress is apparent, nevertheless. A 2001 amendment to Article 1 of the Mexican constitution prohibits discrimination based, *inter alia*, on sexual orientation (“las preferencias”).³²⁰ A federal law protecting sexual minorities from discrimination was passed in 2003.³²¹

³¹³ OTTOSSON, *supra* note 105, at 47.

³¹⁴ Pride at Work, *Uruguay Enacts Historic Civil Unions Law*, <http://www.prideatwork.org/page.php?id=560> (last visited Feb. 3, 2009).

³¹⁵ OTTOSSON, *supra* note 105, at 46.

³¹⁶ PinkNews.co.uk, *Costa Rica Backs International Day Against Homophobia*, May 1, 2008, <http://www.pinknews.co.uk/news/articles/2005-7531.html> (last visited Jan. 31, 2009).

³¹⁷ Douglas Sanders, *Getting Lesbian and Gay Issues on the International Human Rights Agenda*, HUM. RTS. Q., Vol.18 No. 1, 67, 70 (1996).

³¹⁸ See *Lesbian & Gay Mexico*, DIVA, <http://www.divamag.co.uk/diva/listings.asp?CID=648&action=ShowCountry> (last visited Jan.31, 2009). See also Len Evans, *Chronology Of Mexican Gay History*, <http://www.geocities.com/guero/perro/Chron-Mex.htm> (last visited Jan. 31, 2009).

³¹⁹ *Mexico's Mindset Shifting on Homosexual Rights*, THE REAL TRUTH, Mar. 23, 2007, available at <http://www.realtruth.org/news/070323-001-societylifestyles.html>.

³²⁰ Constitución Política de los Estados Unidos Mexicanos, *as amended*, Diario Oficial de la Federación, 5 de Febrero de 1917 (Mex.). Mexican Constitution, available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/1.pdf>.

³²¹ Natara Williams, *Pre-Hire Pregnancy Screening In Mexico's Maquiladoras: Is It Discrimination?*, DUKE J. GENDER L. & POL'Y 131, 146 (2005).

The Constitutional Court of Colombia recently issued a ruling that extended pension benefits to same-sex partners.³²² The Court held that same-sex partners should be given the same health and pension benefits “as a family.”³²³ The Court stated that excluding same-sex partners “would violate the principle of non-discrimination and human dignity as the expression of personal autonomy, protected by international law.”³²⁴

A year earlier, in *X v. Colombia*, the United Nations Human Rights Committee ruled in favor of a man who sought his deceased partner’s pension.³²⁵ The Committee declared that denying a same-sex partner’s pension rights on the basis of his sexual orientation violated the right to equality and non-discrimination protected by Article 26 of the ICCPR:

The Committee recalls its earlier jurisprudence that the prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation. It also recalls that in previous communications the Committee found that differences in benefit entitlements between married couples and heterosexual unmarried couples were reasonable and objective, as the couples in question had the choice to marry or not, with all the ensuing consequences. The Committee also notes that, while it was not open to the author to enter into marriage with his same-sex permanent partner, [applicable Colombian law] does not make a distinction between married and unmarried couples but between homosexual and heterosexual couples. The Committee finds that the State party has put forward no argument that might demonstrate that such a distinction . . . is reasonable and objective. . . . In this context, the Committee finds that the State party has violated article 26 of the Covenant by denying the author’s right to his life partner’s pension on the basis of his sexual orientation.³²⁶

³²² Sentencia C-336/08, 16 Apr. 2008, Bogota [Constitutional Court], D-6947 (Colombia), available at <http://www.corteconstitucional.gov.co/relatoria/2008/c-336-08.rtf>.

³²³ *Colombia: Court Extends Benefits to Same-Sex Couples*, HUMAN RIGHTS WATCH, Apr. 18, 2008, <http://www.hrw.org/english/docs/2008/04/18/colomb18596.htm> (last visited Jan. 31, 2009).

³²⁴ *Id.*

³²⁵ Human Rights Committee, *X v. Colombia* (Communication No. 1361/2005, 14 May 2007).

³²⁶ *Id.* at ¶ 7.2.

Canada has widespread legal protections for sexual minorities. The 1982 Charter guarantees equality for everyone,³²⁷ and the Canadian Supreme Court has recognized sexual orientation as an explicitly protected category.³²⁸ The 1996 Human Rights Act provides a broad range of federal protections for sexual minorities, and every Province has a Human Rights Act. Since the Supreme Court's 1998 ruling in *Vriend v. Alberta*, every Province and Territory has protected sexual orientation in its civil rights laws.³²⁹ In that case, Delwin Vriend was fired from his job as a lab coordinator at King's College, Edmonton (a private religious college) because of his sexual orientation. The Alberta Individual Rights Protection Act (IRPA) did not include sexual orientation as a prohibited basis of discrimination at that time, and Vriend asked the Alberta Court of Queen's Bench to declare that the omission breached section 15 of the Charter. The Court ruled for Vriend but the Alberta Court of Appeal reversed. The Canadian Supreme Court then reversed the Court of Appeal and reinstated the ruling from the Court of Queen's Bench. "The omission of sexual orientation as a protected ground in the IRPA creates a distinction on the basis of sexual orientation," the Court stated.³³⁰ "Gay men and lesbians are treated differently from other disadvantaged groups and from heterosexuals. They, unlike gays and lesbians, receive protection from discrimination on the grounds that are likely to be relevant to them."³³¹ The Court also stated, "IRPA, by its omission or underinclusiveness, denies gays and lesbians the equal benefit and protection of the law on the basis of a personal characteristic, namely sexual orientation."³³²

Subsequently, the Civil Marriage Act of 2005 legalized same-sex marriage in Canada, which became the fourth nation to authorize same-sex marriage—preceded by the Netherlands, Belgium, and Spain.³³³ To foreclose legal challenges, the Canadian Government obtained advance affirmation of the law's constitutionality from the Supreme Court.³³⁴

³²⁷ Canadian Charter of Rights and Freedom, Constitution Act, 1982, Section 15(1), *available at* http://www.solon.org/Constitutions/Canada/English/ca_1982.html.

³²⁸ *Egan v. Canada*, [1995] 2 S.C.R. 513.

³²⁹ *Vriend v. Alberta*, 1998 Can. Sup. Ct. LEXIS 19 (1998).

³³⁰ *Id.* at *80.

³³¹ *Id.*

³³² *Id.*

³³³ Peter W. Hogg, "Canada: The Constitution and same-sex marriage", (2006) ICON 4 4 (712) at 1, *available at* LexisNexis.

³³⁴ *Id.*

The United States

In the United States, a minority of states have nondiscrimination laws protecting sexual minorities. As of July 2008, thirteen states and the District of Columbia banned discrimination based on sexual orientation and gender identity or expression;³³⁵ seven additional states banned discrimination based on sexual orientation alone.³³⁶ In addition, about 100 municipalities in the thirty states lacking statewide nondiscrimination laws had local nondiscrimination laws.³³⁷ No federal law protects sexual minorities from discrimination.

A majority of states have hate crime laws based on sexual orientation. In April 2008, twelve states and the District of Columbia had hate crime laws that included crimes based on sexual orientation and gender identity.³³⁸ Twenty more states had hate crime laws that included crimes based on sexual orientation alone.³³⁹ Thirteen states had hate crime laws that did not include crimes based on sexual orientation or gender identity,³⁴⁰ and five states had no hate crime laws at all.³⁴¹ The federal hate crime law does not protect sexual minorities.

³³⁵ National Gay and Lesbian Task Force, *Nondiscrimination laws map*, http://www.thetaskforce.org/reports_and_research/nondiscrimination_laws (last visited Feb. 27, 2009). The states are California, Colorado, District of Columbia, Hawai'i, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington.

³³⁶ *Id.* The states are Connecticut, Maryland, Massachusetts, New Hampshire, Nevada, New York, and Wisconsin.

³³⁷ *Id.*

³³⁸ National Gay and Lesbian Task Force, *Hate crimes laws map*, http://www.thetaskforce.org/reports_and_research/hate_crimes_laws (last visited Feb. 9, 2009). The states are California, Colorado, Connecticut, District of Columbia, Hawaii, Maryland, Minnesota, Missouri, New Jersey, New Mexico, Oregon, Pennsylvania, and Vermont.

³³⁹ *Id.* The states are Arizona, Delaware, Florida, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Nebraska, Nevada, New Hampshire, New York, Rhode Island, Tennessee, Texas, Washington, and Wisconsin. Michigan mandates hate crime data collection including sexual orientation, but its hate crime penalty laws do *not* include sexual orientation.

³⁴⁰ *Id.* Alabama, Alaska, Idaho, Mississippi, Montana, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Utah, Virginia, and West Virginia.

³⁴¹ *Id.* Arkansas, Georgia, Indiana, South Carolina, and Wyoming. Indiana mandates hate crime data collection including sexual orientation, but has no hate crime penalty laws.

Consensual adult homosexual conduct has been legal throughout the United States only since the United States Supreme Court's decision in *Lawrence v. Texas* (2003).³⁴² But the road to that decision was long and difficult. Only seventeen years earlier, in *Bowers v. Hardwick*,³⁴³ the Court held that states could maintain statutes criminalizing homosexual conduct. Police officers observed Michael Hardwick in his bedroom, engaging in a consensual homosexual act with another adult man. Hardwick was charged with violating a Georgia statute criminalizing sodomy, and challenged the statute's constitutionality in federal court. The Georgia Attorney General, Michael Bowers, appealed an Eleventh Circuit ruling that the statute unconstitutionally violated Hardwick's fundamental due process rights under fourteenth amendment to the Constitution.³⁴⁴ In a 5-4 decision, the Supreme Court held that there was no constitutional protection for homosexual acts, and that states were free to make such acts illegal.³⁴⁵ Justice Byron White, writing for the majority, stated, "Proscriptions against that conduct have ancient roots. . . . [T]o claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious."³⁴⁶

Justice Harry Blackmun wrote an eloquent dissent that is still widely quoted, and gave solace to many in the period following the Court's ruling. After a pointed opening, Blackmun stated:

The statute at issue . . . denies individuals the right to decide for themselves whether to engage in particular forms of private, consensual sexual activity. The Court concludes that [the statute] is valid essentially because "the laws of . . . many States . . . still make such conduct illegal and have done so for a very long time." But the fact that the moral judgments expressed by statutes like [this] may be "'natural and familiar . . . ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.'"³⁴⁷

Blackmun believed the Georgia statute violated Hardwick's right to privacy. "If that right means anything, it means that, before Georgia can prose-

³⁴² *Lawrence v. Texas*, 539 U.S. 558 (2003).

³⁴³ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

³⁴⁴ *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985).

³⁴⁵ *Bowers*, 478 U.S. at 191.

³⁴⁶ *Id.* at 192-94.

³⁴⁷ *Id.* at 199 (quoting *Roe v. Wade*, 410 U.S. 113, 117 (1973) (quoting *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting))).

cute its citizens for making choices about the most intimate aspects of their lives, it must do more than assert that the choice they have made is an 'abominable crime not fit to be named among Christians.'"³⁴⁸ Regarding religious arguments in the State's brief, Blackmun stated: "The assertion that 'traditional Judeo-Christian values proscribe' the conduct involved cannot provide an adequate justification for [the statute]. That certain, but by no means all, religious groups condemn the behavior at issue gives the State no license to impose their judgments on the entire citizenry."³⁴⁹

In 2003, the Supreme Court overturned *Bowers v. Hardwick* with its holding in *Lawrence v. Texas*,³⁵⁰ and held that laws criminalizing consensual homosexual conduct violated the liberty and privacy rights of the United States Constitution: "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled."³⁵¹

Justice Anthony Kennedy wrote the majority opinion in *Lawrence*. The Court finally recognized that private, intimate relationships between consenting adults should not be subject to government scrutiny or control simply because the participants were of the same sex. "Liberty protects the person from unwarranted government intrusions into a dwelling or other private places," Justice Kennedy wrote.³⁵² "In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence."³⁵³

Parts of Kennedy's opinion evoked the spirit of opinions from the South African Constitutional Court; for example, "adults may choose to enter upon [a personal] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. . . . The liberty protected by the Constitution allows homosexual persons the right to make this choice."³⁵⁴

The Court's opinion did not leave the moralistic arguments unheeded. "It must be acknowledged, of course, that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices

³⁴⁸ *Id.* at 200 (quotation marks altered) (quoting *Herring v. State*, 119 Ga. 709, 721 (1904)).

³⁴⁹ *Id.* at 211. See generally Brief of Petitioner-Appellant at 20, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140), available at LexisNexis.

³⁵⁰ *Lawrence v. Texas*, 539 U.S. 558 (2003).

³⁵¹ *Id.* at 578.

³⁵² *Id.* at 562.

³⁵³ *Id.*

³⁵⁴ *Id.* at 567.

to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family."³⁵⁵ Justice Kennedy, himself a Roman Catholic, acknowledged these voices: "For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. . . . 'Our obligation is to define the liberty of all, not to mandate our own moral code.'"³⁵⁶

The Court also acknowledged the equality concern, but the majority decided the case on due process grounds: "Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."³⁵⁷ Justice Kennedy explained, "If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons."³⁵⁸ Again reminiscent of South African opinions, the Court seemed to want to make an exceedingly clear statement: "When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."³⁵⁹

Justice Sandra Day O'Connor cast seemingly incongruous votes with the respective majorities in both *Bowers* and *Lawrence*. She did not admit in *Lawrence* that she erred in *Bowers*, or that her thinking had simply evolved. Instead, she wrote a concurring opinion in *Lawrence* agreeing with the result but on equal protection grounds.³⁶⁰

Justice Antonin Scalia penned a scathing dissent.³⁶¹ But he seemed angrier about the Court's abortion decisions than about the *Lawrence* decision itself. He sounded frantic and old-fashioned when he talked about sex and morals:

³⁵⁵ *Id.* at 571.

³⁵⁶ *Id.* (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

³⁵⁷ *Id.* at 575.

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ *Id.* at 579-85 (O'Connor, J., concurring).

³⁶¹ *Id.* at 586-605 (Scalia, J., dissenting).

State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are . . . sustainable only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding."³⁶²

Scalia also indicted a considerable portion of the American legal profession: "Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct."³⁶³

Laws recognizing and protecting relationships are still woefully lacking in the United States. Only Massachusetts and Connecticut have full marriage equality. Two states, New York and Rhode Island, recognize same-sex marriages performed elsewhere.³⁶⁴ In November 2008, four states had laws recognizing civil unions,³⁶⁵ and two states plus the District of Columbia had domestic relationship laws.³⁶⁶ Three states had more limited relationship recognition laws.³⁶⁷ Federal law is blatantly discriminatory. Under the Defense of Marriage Act (DOMA),³⁶⁸ enacted with overwhelming Congressional support in 1996 and signed by President Clinton, no state is required to recognize a relationship between persons of the same sex as a marriage, even if the relationship was legally performed in a state that recognizes same-sex marriage. In addition, the Federal Government cannot treat same-sex relationships as marriages for any purpose, under any circumstances. Although many have questioned whether this Act should stand under the Full Faith and Credit Clause of the United States Constitution, no court has ruled on the matter.

President Barack Obama was not in the United States Senate when the DOMA was passed, but has repeatedly stated that he supports its re-

³⁶² *Id.* at 590.

³⁶³ *Id.* at 602.

³⁶⁴ See National Gay and Lesbian Task Force, *Relationship Recognition Map for Same-Sex Couples in the United States*, http://www.thetaskforce.org/reports_and_research/relationship_recognition (last visited Feb. 9, 2009).

³⁶⁵ *Id.* California, New Hampshire New Jersey, and Vermont.

³⁶⁶ *Id.* District of Columbia, Oregon, and Washington.

³⁶⁷ *Id.* Hawai'i, Maine, and Maryland.

³⁶⁸ 1 U.S.C. § 7 (1996) and 28 U.S.C. § 1738C (1996).

peal.³⁶⁹ President Obama responded to a Human Rights Campaign questionnaire in 2007, and his answers are encouraging.³⁷⁰ His responses were clear statements that he “believe[s] the Employment Non-Discrimination Act should be expanded to include sexual orientation and gender identity”; wants to “expand federal jurisdiction to reach violent hate crimes perpetrated because of . . . sexual orientation [or] gender identity”; supports “bring[ing] Medicaid coverage to low-income, HIV-positive Americans” and “increased funding for HIV/AIDS prevention, treatment and research”; believes “the federal government recognize [a] state’s legal recognition of [same-sex] couples . . . for purposes of federal benefits and tax treatment”; “supports the expansion of the Family and Medical Leave Act to cover domestic partners and their children”; supports “modifying the Social Security System to pay survivor benefits to the same-sex partners of gay and lesbian people”; favors “domestic partner coverage for gay and lesbian employees of the civilian federal workforce”; “believe[s] there are too many children who need loving parents to deny one group of people adoption rights”; would support a law allowing “an American citizen to petition for immigration sponsorship for a same-sex partner”; and supports a repeal of the military’s “Don’t Ask, Don’t Tell” policy.³⁷¹ The President does not support national same-sex marriage, but “believe[s] civil unions should include the same legal rights that accompany a marriage license.”³⁷² He “would oppose any effort to stifle a state’s ability to decide this question on its own.”³⁷³

Many Americans are hopeful that President Obama will lead the United States in taking more progressive and proactive positions on rights for sexual minorities. He has stated:

While we have come a long way since the Stonewall riots in 1969, we still have a lot of work to do. Too often, the issue of LGBT rights is exploited by those seeking to divide us. But at its core, this issue is about who we are as Americans. It’s about whether this nation is going to live

³⁶⁹ See, e.g., Alex Okrent, *Equality is a Moral Imperative*, <http://my.barackobama.com/page/community/post/alexokrent/gGgJS> (last visited Jan. 29, 2009).

³⁷⁰ See HRC, ‘08 Presidential Candidates Respond to HRC’s Questionnaire on GLBT Issues, <http://www.hrc.org/news/5207.htm> (last visited Feb. 4, 2009).

³⁷¹ HRC, 2008 Presidential Questionnaire—Senator Barack Obama, <http://pride.barackobama.com/page/content/lgbthome> (last visited Feb. 4, 2009).

³⁷² *Id.*

³⁷³ *Id.*

up to its founding promise of equality by treating all its citizens with dignity and respect.³⁷⁴

California, with its large population and extreme political views on both sides of the spectrum, continues to be a focal point for sexual minorities' rights in the United States. In 1977, the California legislature passed a statute stating, "Marriage is a personal relation arising out of a civil contract between a man and a woman"³⁷⁵ Voters affirmed this sentiment in 2000, when they approved Proposition 22, which stated, "[o]nly marriage between a man and a woman is valid or recognized in California."³⁷⁶ In 1999, the legislature and governor had enacted a statute that "established a domestic partnership registry, granted hospital visitation privileges to registered domestic partners equal to those of spouses and other immediate family members, and gave health benefits to domestic partners of state employees."³⁷⁷ Subsequently, in 2003, the legislature and governor enacted the Domestic Partners Rights and Responsibilities Act,³⁷⁸ "which extended to registered domestic partners virtually all of the rights and responsibilities of marriage."³⁷⁹ In 2005 and 2007, the legislature passed bills that would have legalized same-sex marriage, both of which were vetoed by Governor Arnold Schwarzenegger.³⁸⁰

On May 15, 2008, the California Supreme Court issued a decision declaring unconstitutional state statutes that limited marriage to opposite-sex couples.³⁸¹ Throughout its opinion, the Court relied heavily on *Perez v. Sharp*,³⁸² the 1948 landmark decision which held that statutes prohibiting

³⁷⁴ Obama Pride, <http://pride.barackobama.com/page/content/lgbthome> (last visited Feb. 4, 2009).

³⁷⁵ CAL. FAM. CODE § 300 (West 2008), *invalidated by* In re Marriage Cases, 183 P.3d 384 (2008).

³⁷⁶ Marriage Watch, *California Proposition 22*, <http://www.marriagewatch.org/media/prop22.htm> (last visited Feb. 4, 2009). Proposition 22 passed with 61.4% of the vote.

³⁷⁷ UC Berkeley Institute of Governmental Studies, *Same-Sex Marriage in California - Overview and Issues*, <http://igs.berkeley.edu/library/htGayMarriage.html> (last visited Feb. 4, 2009). The statute was AB26. Assembly Bill, http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_0001-0050/ab_26_bill_19991010_chaptered.html (last visited Feb. 4, 2009).

³⁷⁸ Assem. B. 205, http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_0201-0250/ab_205_bill_20030922_chaptered.html (last visited Feb. 4, 2009).

³⁷⁹ UC Berkeley Institute of Governmental Studies, *supra* note 377.

³⁸⁰ AB19, vetoed Sep. 29, 2005, and AB43, vetoed Oct. 12, 2007.

³⁸¹ In re Marriage Cases, 183 P.3d 384 (Cal. 2008).

³⁸² *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948).

interracial marriage were unconstitutional. The 2008 Court applied the strict scrutiny standard, explaining, “Because sexual orientation, like gender, race, or religion, is a characteristic that frequently has been the basis for biased and improperly stereotypical treatment and that generally bears no relation to an individual’s ability to perform or contribute to society, it is appropriate for courts to evaluate with great care and with considerable skepticism any statute that embodies such a classification.”³⁸³ The Court acknowledged that the California Constitution does not explicitly recognize a marriage right, but stated that “past California cases establish beyond question that the right to marry is a fundamental right whose protection is guaranteed to all persons by the California Constitution.”³⁸⁴

The right to marry, stated the Court, is “presumably . . . embodied as a component of the liberty protected by the state due process clause,”³⁸⁵ but is also protected by “an individual’s interest in personal autonomy by California’s explicit state constitutional privacy clause.”³⁸⁶ Ultimately, it found that “the right to marry represents the right of an individual to establish a legally recognized family with the person of one’s choice, and, as such, is of fundamental significance both to society and to the individual.”³⁸⁷ “In recognizing . . . that the right to marry is a basic, constitutionally protected civil right—a fundamental right of free men and women – the governing California cases establish that this right embodies fundamental interests of an individual that are protected from abrogation or elimination by the state.”³⁸⁸ The Court rejected voter initiative measures such as Proposition 22 because “initiative measures adopted by the electorate are subject to the same constitutional limitations that apply to statutes adopted by the Legislature”³⁸⁹ Finally, the Court held that language that limited marriage to opposite-sex couples was “unconstitutional and must be stricken from the statute, and that the remaining statutory language must be understood as making the designation of marriage available both to opposite-sex and same-sex couples.”³⁹⁰

The California Supreme Court’s decision outraged conservative groups, who lost no time gathering signatures to put a voter initiative question on the November ballot, ultimately known as Proposition 8. The pur-

³⁸³ *In re Marriage Cases*, 183 P.3d at 444.

³⁸⁴ *Id.* at 419.

³⁸⁵ *Id.* at 420.

³⁸⁶ *Id.*

³⁸⁷ *Id.* at 423.

³⁸⁸ *Id.* at 426 (internal quotation marks and citation omitted; emphasis removed).

³⁸⁹ *Id.* at 449.

³⁹⁰ *Id.* at 453.

pose of Proposition 8 was to add language to the California Constitution stating, “[o]nly marriage between a man and a woman is valid or recognized in California.”³⁹¹ The campaign was intense, and many people and organizations from outside the state participated. Spending ultimately exceeded \$83 million.³⁹² Noteworthy supporters of the measure included the Roman Catholic Church,³⁹³ the Mormon Church,³⁹⁴ and Republican presidential candidate John McCain.³⁹⁵ On November 4, 2008, California voters approved Proposition 8 with 52% of the vote.³⁹⁶

After the election, numerous lawsuits were filed seeking to overturn Proposition 8 and for a holding that the measure is not retroactive. On November 19, 2008, the California Supreme Court denied requests to stay enforcement of Proposition 8.³⁹⁷ The Court also agreed to decide three issues presented in cases filed opposing Proposition 8: (1) “Is Proposition 8 invalid because it constitutes a revision of, rather than an amendment to, the California Constitution?”, (2) “Does Proposition 8 violate the separation-of-powers doctrine under the California Constitution?”, and (3) “If Proposition 8 is not unconstitutional, what is its effect, if any, on the marriages of same-sex couples performed before the adoption of Proposition 8?” Briefs are due in January 2009, and oral argument is expected in March 2009.

³⁹¹ Smartvoter.org, *Proposition 8*, <http://www.smartvoter.org/2008/11/04/ca/state/prop/8/> (last visited Feb. 4, 2009).

³⁹² Lisa Leff, *Donors pumped \$83M to Calif. gay marriage campaign*, SAN JOSE MERCURY NEWS, http://www.mercurynews.com/ci_11612308?IADID=search-www.mercurynews.com-www.mercurynews.com (last visited Feb. 20, 2009).

³⁹³ See Advocate.com, *Catholic Bishops Endorse Prop. 8*, http://www.advocate.com/news_detail_ektid59060.asp (last visited Feb. 4, 2009).

³⁹⁴ See Newsroom, *California and Same-Sex Marriage*, <http://newsroom.lds.org/ldsnewsroom/eng/commentary/california-and-same-sex-marriage> (last visited Feb. 4, 2009). See also Joe Pyrah, *LDS donate millions to fight gay marriage*, PROVO DAILY HERALD, <http://www.heraldextra.com/content/view/280669/3/> (last visited Feb. 4, 2009).

³⁹⁵ Justin Ewers, *McCain Supports Efforts to Ban Gay Marriage*, U.S. NEWS & WORLD REPORT, <http://www.usnews.com/articles/news/campaign-2008/2008/06/27/mccain-supports-efforts-to-ban-gay-marriage.html> (last visited Feb. 4, 2009).

³⁹⁶ DEBRA BOWEN (CAL. SEC’Y OF STATE), STATEMENT OF VOTE 7 (2008), *available at* http://www.sos.ca.gov/elections/sov/2008_general/sov_complete.pdf.

³⁹⁷ Judicial Council Of California, *California Supreme Court Takes Action on Proposition 8*, News Release, *available at* <http://www.courtinfo.ca.gov/presscenter/newsreleases/NR66-08.PDF>. See *Strauss v. Horton*, No. S168047 (Cal. 2008) (en banc); *Tyler v. California*, No. S168066 (Cal. 2008) (en banc); *San Francisco v. Horton*, No. S168078 (Cal. 2008) (en banc).

In October 2008, the Connecticut Supreme Court decided *Kerrigan v. Commissioner of Public Health*.³⁹⁸ Connecticut had civil unions for same-sex couples, but a state statute prohibited same-sex marriage. In *Kerrigan*, eight same-sex couples challenged the statute, arguing that it violated their state constitutional rights to substantive due process and equal protection.³⁹⁹ A lower court had granted summary judgment to the state. On review, the Supreme Court held, *inter alia*, “[I]n light of the history of pernicious discrimination faced by gay men and lesbians, and because . . . marriage carries with it a status and significance that the newly created classification of civil unions does not embody, the segregation of heterosexual and homosexual couples into separate institutions constitutes a cognizable harm.”⁴⁰⁰ The Court found that the state’s “statutory scheme impermissibly discriminates against gay persons on account of their sexual orientation,” so they reversed the lower court and remanded the case “with direction to grant the plaintiffs’ motion for summary judgment.”⁴⁰¹

The Court noted that when “the intended effect of a law is to treat politically unpopular or historically disfavored minorities differently from persons in the majority or favored class, that law cannot evade constitutional review under the separate but equal doctrine,”⁴⁰² and that “there is no doubt that civil unions enjoy a lesser status in our society than marriage.”⁴⁰³ Finding that under the Connecticut constitution, sexual minorities are a protected class,⁴⁰⁴ the Court acknowledged the commitment of many people “to preserving the traditional concept of marriage as a heterosexual institution.”⁴⁰⁵ But the Court noted that “[t]radition alone never can provide sufficient cause to discriminate against a protected class”⁴⁰⁶ When there is no “sound justification for denying same sex couples the right to marry, it therefore may be true, as Justice Scalia has asserted, that ‘preserving the traditional institution of marriage is just a kinder way of describing the state’s *moral disapproval* of same-sex couples.’”⁴⁰⁷ The Court then observed, “Moral disapproval alone . . . is insufficient reason to benefit one

³⁹⁸ *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008).

³⁹⁹ *Id.* at 411.

⁴⁰⁰ *Id.* at 412.

⁴⁰¹ *Id.* at 413.

⁴⁰² *Id.* at 418.

⁴⁰³ *Id.* at 419.

⁴⁰⁴ *See generally id.*

⁴⁰⁵ *Id.* at 478.

⁴⁰⁶ *Id.* at 479.

⁴⁰⁷ *Id.* (internal punctuation omitted; emphasis removed) (quoting *Lawrence v. Texas*, 539 U.S. 558, 601 (2003) (Scalia, J., dissenting)).

group and not another because statutory classifications cannot be 'drawn for the purpose of disadvantaging the group burdened by the law.'"⁴⁰⁸

VI. PROPOSALS

Three basic truths must be acknowledged. First, many nations have made great strides toward nondiscrimination and equality for sexual minorities. Second, in most parts of the world, the legal protections afforded sexual minorities could be improved, and in many places vastly improved. Third, laws can go only so far toward accomplishing ultimate goals of equal rights and nondiscrimination.

Addressing the third point first, enacting laws will neither change attitudes nor dissolve long-held prejudices. What it *will* do is extend the protection of the law to sexual minorities—people who are longstanding objects of many kinds of ill and unfair treatment. As discussed earlier, it also will express the intent of the state to condone *nothing but* equal and fair treatment of everyone, regardless of gender identity or sexual orientation. The will of the state should ideally be the will of the higher nature of the people, after all. Results will not be instantaneous, but over time, attitudes and minds will change; deep prejudices will weaken and eventually evaporate and the majority of people will someday wonder how society ever treated sexual minorities so badly. As Michel Foucault stated, "Justice must always question itself, just as society can exist only by means of the work it does on itself and on its institutions."⁴⁰⁹

The United States, which likes to consider itself the world's leader, must step forward and take a prominent role in encouraging humane treatment of sexual minorities, abolition of repressive laws, and adoption of protective ones. Obviously, the nation can only do this if it has taken such steps within its own borders. Nothing less than the full spectrum of rights accorded to heterosexuals must also be recognized for sexual minorities. It is past time for the United States to enact federal legislation prohibiting any form of discrimination based on gender identity or sexual orientation, and to extend federal hate crime laws to apply to those same categories. The DOMA must be repealed, and the right of states to enact their own marriage laws has to be protected. I am far less interested in what things are called than the substance of the rights—for example, marriage *versus* civil union. Although I recognize that many do not agree with me, I believe the most

⁴⁰⁸ *Id.* (quoting *Romer v. Evans*, 517 U.S. 620, 632 (1996)).

⁴⁰⁹ DIDIER ERIBON, MICHEL FOUCAULT ?? (Bestsy Wing trans., Harvard University Press 1991) (1989).

important thing is to get the substantive rights in place; we can then argue about what to call them.

It is vital that nations with more enlightened laws find ways to work together to persuade the rest of the world to begin moving in the right direction. While no one can guarantee what another sovereign nation will do, we could make it very difficult for nations to thrive that refuse to recognize fundamental rights for sexual minorities. We have proven to be quick to apply sanctions and even go to war over far less serious issues than executing one person for loving another. I absolutely do not propose or favor military action, but if even some small portion of the resourcefulness used to persuade nations on other issues were applied to the goal of obtaining rights recognition for sexual minorities, it could make a tremendous difference.

Some possibilities to be explored might include incentives or rewards for states that accord equal rights to sexual minorities or at least demonstrate progress toward that goal, increased status of such nations in international fora, and trade and economic sanctions for states that refuse to comply. I do not claim that accomplishing these things would be easy, but surely the goals of equality and ending discrimination are worthy enough to inspire serious efforts. What we cannot do is nothing. If we wait to see what will happen and trust that improvements will be made in due time, we will almost certainly find ourselves going nowhere.

VII. CONCLUSION

At the outset of this article I asked the question whether sexual identity has already been established as a fundamental human right, and if not, why? The answer is neither simple nor apparent: it has, but it has not.

Some factors indicate that such a fundamental right has been recognized at an aspirational level. The IBHR and other international treaties declare such truths as, "All human beings are born free and equal in dignity and rights,"⁴¹⁰ and "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law."⁴¹¹ Many people argue persuasively, as discussed above, that such documents as well as constitutions and statutes have already recognized rights for sexual minorities. Others argue that existing rights could be expanded to protect sexual minorities' rights. Even people who are opposed to laws specifically guar-

⁴¹⁰ UDHR, *supra* note 29, pmbl., art. 1. *See also* Charter of the United Nations (San Francisco, 26 June 1945), 3 Bevans 1153, 59 Stat. 1031, T.S. No. 993, *entered into force* 24 Oct. 1945, pmbl.

⁴¹¹ ICCPR, *supra* note 30, art. 26.

anteeing the rights of sexual minorities often claim that such laws are unnecessary because sexual minorities are already protected by the same laws that protect everyone else, although their goal is certainly not to recognize a right to have an atypical sexual identity.⁴¹²

Also militating toward the conclusion that a fundamental right has been recognized is the fact that so many nations and states have recognized important rights for sexual minorities in their laws and constitutions. Some believe that with every positive legislative change or judicial decision, something akin to a trend becomes slightly more visible. Where rights for sexual minorities have been recognized, the recognition has tended to manifest in two ways: first, as extensions of existing rights that belong to everyone—particularly equality, privacy, and liberty; and second, as portions of constitutions and statutes that purport to guarantee and protect the rights of sexual minorities in particular.

But in many countries, sexual minorities have no rights, and in some they can still be punished by death. Unquestionably, rights for sexual minorities are a long way from entrenchment as customary, binding international law by *opinio juris*.⁴¹³ Many factors contribute to the reluctance and outright refusal of so many states to recognize rights for everyone regardless of sexual identity. Perhaps foremost among these are tradition, religion, morality, and fear. The most significant factor, however, is likely the heteronormativity that permeates every society in the world. Even as undeniable progress is made in recognizing rights for sexual minorities, a backlash is felt as the heteronormative power structure struggles to maintain its influence.

The recognition and protection of sexual minorities' rights has been strongest in the industrialized Western world, especially in Western Europe and Canada, but there are important exceptions. Especially noteworthy are South Africa, some eastern European nations (e.g., Czech Republic and Hungary), and parts of Latin America (e.g., Uruguay and Costa Rica), all nations with less economic and industrial influence that are struggling to be particularly attentive to the rights of all persons.

⁴¹² See, e.g., Alysse Michelle El Hage, *Special Rights for Homosexuals: Why Sexual Orientation Should Not Be a Protected Class*, FINDINGS 4 (1999), available at <http://www.ncfamily.org/PolicyPapers/Findings%209907%20Special%20rts.pdf> (“[T]hese bills aren’t really about protecting homosexuals Homosexuals are already protected in these areas just like everyone else.”) See also Citizenlink.com, *Hate-Crimes Bill Would Give Gays Special Rights*, citizenlink.com, <http://www.citizenlink.org/CLNews/A000004181.cfm>.

⁴¹³ See *Opinio juris sive necessitate*, *supra* note 34.

The United States is in the unenviable position of being the presumptive leader of the world—a leader who simply cannot make up her mind to lead in this important area. The reasons are many, and include such things as the strong conservative trend of the last thirty years and the commensurate influence of evangelical fundamentalist Christians, as well as the inertia of the federal/state governmental dichotomy. The federal system is waiting for states to make changes, while the states are waiting for leadership from the federal system. The national leaders cannot seem to understand finally that strong federal action will be necessary, just as it has been in other situations involving rights advancement for minorities.

When the more progressive nations can work together to lead more reluctant ones, we will see real progress in the world. With the continued example and leadership of nations further along than the United States and new leadership in Washington, D.C., the solution may not be so far away. Mahatma Ghandi's wisdom can instruct us all:

*The true source of right is duty. If we all discharge our duties, rights will not be far to seek. If leaving duties unperformed we run after rights, they will escape us like a will-o-the-wisp.*⁴¹⁴

⁴¹⁴ Mohandas K. Ghandi, Presidential Address at Kathiawar Political Conference, Bhavanagar, Jan. 8, 1925, Collected Works of Mahatma Gandhi Online, vol. 30, available at www.gandhiserve.org/cwm/VOL030.PDF.